TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible] 608

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WELLSVILLE REFINING COMPANY, APPELLANTS,

vs.

ROBERT D. BENSON ET AL., PARTNERS DOING BUSINESS UNDER THE PARTNERSHIP NAME OF THE TIDEWATER PIPE COMPANY, LIMITED.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED APRIL 16, 1913.

(23630)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 1055.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WELLSVILLE REFINING COMPANY, APPELLANTS,

vs.

ROBERT D. BENSON ET AL., PARTNERS DOING BUSINESS UNDER THE PARTNERSHIP NAME OF THE TIDEWATER PIPE COMPANY, LIMITED.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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a In the United States Commerce Court.

ROBERT D. BENSON, WILLIAM S. BENSON, OF PASSAIC, NEW Jersey; Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., of New York City, New York; Oscar L. Hascy, of Albany, New York; Robert McKelvy, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of The Tide-Water Pipe Company (Limited), petitioners,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE Commerce Commission, Wellsville Refining Company, interveners.

No. 77.

UNITED STATES OF AMERICA, *ss:*

Be it remembered that in the United States Commerce Court, in the city of Washington, District of Columbia, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition for injunction.

(Filed July 23, 1912.)

1 In the United States Commerce Court.

ROBERT D. BENSON, WILLIAM S. BENSON, OF PASSAIC, NEW Jersey; Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., of New York City, New York; Oscar L. Hascy, of Albany, New York; Robert McKelvy, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of The Tide-Water Pipe Company (Limited), petitioners,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

No. 77.

PETITION FOR INJUNCTION.

To the honorable the judges of the said court:

2 The petitioners, Robert D. Benson, William S. Benson, Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., Oscar L. Hascy, Robert McKelvy, and Willis I. Lewis, doing business under the partnership name of The Tide-Water Pipe Company (Limited), bring this petition against the United States of America to restrain a certain order of the Interstate Commerce Commission, and set forth the following facts constituting the petitioners' cause of action:

I.

The individual petitioners are members of the partnership formed by agreement of partnership in compliance with an act of the General Assembly of Pennsylvania of June 2nd, 1874, and the supplements thereto, and are doing business under the name of The Tide-Water Pipe Company (Limited); that the company was so formed

in 1878 for the term of twenty years and was reorganized in November, 1898, for a further period of twenty years.

II.

The company has no charter, is not a corporation, has no franchises. No State or Federal law grants the company existence or extends to the company any rights or franchises. The company has no right of eminent domain. All its lines have been built upon private right of way acquired by purchase.

III.

The trunk lines of the company are six inches in diameter. The first line was built in 1878–9, extending from Rixford, McKean County, Pennsylvania, to Williamsport, Lycoming County,
3 Pennsylvania. In 1884 the line was extended to Tamanend, Schuylkill County, Pennsylvania, and in 1888 further extended to Bayonne, New Jersey. The company also owns and operates branches from the Allegany, New York, field, and branches through much of the McKean County, Pennsylvania, field, and also has a six-inch line extending from Stoy, Crawford County, Illinois, through the States of Illinois, Indiana, Ohio, and Pennsylvania, to Rixford, aforesaid.

IV.

The company is not a common carrier, does not act as such, and does not hold itself out as such or offer to carry oil for the public, and the capacity of the lines is not sufficient to furnish public service and cannot be made to carry more oil than the company uses in its own business.

V.

Crude oil which this pipe line carries has a market limited to the refiners, because the oil is not used in its natural state. It cannot be burned in lamps or used for lubricating purposes until it has been refined. The economics of the oil business has made it necessary to join the business of refining the crude oil with the pipe-line business, so as to warrant constant operation of the pipe line and continuous supply of crude oil for the refinery. The pipe line has become by the nature of the business an adjunct to the refinery. It has, therefore, become necessary to furnish outlet for crude oil, to associate
with the pipe lines refineries of sufficient capacity to take all
4 the crude the lines will carry. The only way this could be accomplished was for the same interests which owned the pipe line to own and control refineries having a capacity equal to the capacity of the line.

VI.

To this end the owners of this pipe line, in 1888, organized the Tide-Water Oil Company under the laws of the State of New Jersey, the latter company having a refining capacity equal to the entire capacity of the pipe line. This refinery is located on the New York Harbor at Bayonne, New Jersey.

VII.

The Tide Water Oil Company has many millions of dollars invested in refining plant at Bayonne, New Jersey, and the petitioners are large owners of stock in the Tide Water Oil Company.

VIII.

That if this pipe line were to be dedicated to public service the refinery of the Tide-Water Oil Company would be deprived of its crude supply and your petitioners would suffer great and irreparable injury and damage.

IX.

That on account of the rapid growth of the city of New York and the city of Bayonne, through which this pipe line passes, the building of another line to supply said refinery would be impracticable, as the cost of right of way, if it could be obtained, would be prohibitive.

X.

5 Your petitioners are also interested as owners in large acreage of oil-producing property in the States of Pennsylvania and Illinois, the crude oil from which is carried by this pipe line to the said refinery, and the pipe line is worked to its full capacity in delivering the oil which the petitioners so produce and purchase; so that to require the petitioners to transport oil for the public to any extent will in so much deprive the owners of the use of the said pipe-line property.

XI.

That the said refinery is designed and constructed to refine only certain kinds of crude oil known as sweet or nonsulphurous oil, and the pipe line has been constructed to such oil fields as produce suitable oil therefor, and if this pipe line were to be used to transport sour or sulphurous oil it would contaminate the sweet oil and subject the petitioners to irreparable loss and damage.

XII.

The petitioners thus show that the use of their pipe line is private, not public. To its owners it has a peculiar adaptation to other properties in which these partners have a common interest. It connects their oil producing fields with their refinery. If the pipe line is declared a public carrier, the owners will be deprived of its use as effectually as though the physical property were condemned and taken by the Government for Federal purposes, and no compensation in the way of tolls would be just compensation for such taking and dedication of your petitioners' private property.

6 XIII.

That the Interstate Commerce Commission at its own initiative instituted certain proceedings against this petitioner, The Tide-Water Pipe Company, Limited, wherein the above and foregoing facts were shown by competent and uncontradicted evidence, and the said Inter-

state Commerce Commission did on the 3rd day of June, 1912, make its order as follows:

Order.

At a general session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 3rd day of June, A. D. 1912.

No. 4199. In the Matter of Pipe Lines.

This proceeding having been instituted by the commission on its own motion, and investigation having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon; which said report is hereby referred to and made a part hereof:

It is ordered, That respondents, The Oklahoma Pipe Line Company, The Prairie Oil and Gas Company, Standard Oil Company of Louisiana, The Ohio Oil Company, Standard Oil Company of New Jersey, The Tide-Water Pipe Company, Limited, Producers & Refiners Oil Company, Limited, United States Pipe Line Company, Pure Oil Company, Pure Oil Pipe Line Company, The National Pipe Line Company, The Uncle Sam Oil Company, and the Uncle Sam Oil Company of Kansas, be, and they are hereby, notified and required to file with this commission, on or before the 1st day of September, 1912, schedules of their rates and charges for the
7 transportation of oil, in compliance with the provisions of the act to regulate commerce.

By the Commission.

[SEAL.] JOHN H. MARBLE, *Secretary.*

That the above and foregoing order of the Interstate Commerce Commission was served upon The Tide-Water Pipe Company, Limited, by mailing a copy thereof to said company and to W. I. Lewis, one of the members of said partnership.

A copy of the order and report of the said Interstate Commerce Commission is printed and attached hereto as "Schedule A."

XIV.

Your petitioners further show that the said order of the Interstate Commerce Commission was made and entered arbitrarily and without sufficient evidence to support it; that the order of the said Commission is unreasonable, unlawful, and beyond its statutory power in that it operates to take the private property of the petitioners without due process of law and assumes to take and deprive the petitioners of their property without adequate compensation; that the order is illegal, erroneous, and made under a misinterpretation of the law so far as the same is intended to apply to the petitioners' company.

XV.

Your petitioners further show that if the said order of the Interstate Commerce Commission should be made effective and should be enforced it would compel your petitioners to hold themselves

8 out as common carriers and to dedicate their private property to public use and would deprive the petitioners of their property without adequate compensation.

XVI.

Your petitioners further show that if the said order of the Interstate Commerce Commission is allowed to become operative against your petitioners, The Tide Water Pipe Company, Limited, will be subjected to excessive penalties and will be caused irreparable injury and damage.

XVII.

Your petitioners also show that the said Interstate Commerce Commission, notwithstanding the facts above set forth, maintains and intends to maintain its said unlawful and erroneous order and will compel your petitioners to obey the same unless the said order is enjoined by your honorable court. All of which acts and orders of the said Interstate Commerce Commission are contrary to equity and good conscience and tend to the manifest wrong and irreparable injury of your petitioners.

Your petitioners, therefore, pray that upon the filing of this petition an order be entered in this suit for the time being and during the pendency of this suit enjoining and suspending the said order of the Interstate Commerce Commission so far as it is intended to affect the petitioners and restraining the said Interstate Commerce Commission from enforcing the said order against the petitioners, and that upon final hearing of this suit a decree be entered

9 setting aside, annulling, and enjoining the said order of the Interstate Commerce Commission perpetually so far as the same is intended to apply to or affect the petitioners or their said pipe line.

Your petitioners further pray that such other and further relief may be granted as justice and equity may require and that your honors grant to the petitioners a writ of subpœna of the United States of America and that due service be made thereof upon the respondent as provided by law requiring the answer to this petition, but not under oath (an answer under oath being hereby expressly waived).

W. I. Lewis,
Arch. F. Jones,
R. R. Lewis,
Counsel for the Petitioners.

State of New York,
County of New York, ss:

Robert D. Benson, being first duly sworn according to law, deposes and says he is the president of The Tide-Water Pipe Company, Limited, and one of the petitioners in the above entitled case; that he knows the facts stated in the above and foregoing petition and that the statements therein are true.

Robert D. Benson.

Sworn and subscribed before me this 20th day of July, 1912.

FLORENCE J. WALSH,
Notary Public for Kings Co.

(Certificate filed in New York Co. No. 21.)
[NOTARIAL SEAL.]

28 *Appearance.*

(Filed July 25, 1912.)

In the United States Commerce Court.

ROBERT D. BENSON, WILLIAM S. BENSON, of Passaic, New Jersey; Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., of New York City, New York; Oscar L. Hascy, of Albany, New York; Robert McKelvey, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of The Tide-Water Pipe Company, Limited, petitioners. } No. 77.

v.

THE UNITED STATES OF AMERICA, RESPONDENT.

Mr. GEORGE F. SNYDER,
Clerk United States Commerce Court, Washington, D. C.:

I hereby enter the appearance of the Interstate Commerce Commission as intervening respondent and of myself as its solicitor in the above entitled case.

Dated Washington, D. C., July 24, 1912.

CHAS. W. NEEDHAM,
Assistant Solicitor.

29 In the United States Commerce Court.

ROBERT D. BENSON, WILLIAM S. BENSON, of Passaic, New Jersey; Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., of New York City, New York; Robert McKelvey, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of The Tidewater Pipe Company, Limited, petitioners, } No. 77.

v.

THE UNITED STATES OF AMERICA, RESPONDENT.

Order extending time to answer.

(Filed July 31, 1912.)

Upon application duly made in that behalf, and good cause being shown, it is ordered that the time within which the United States of America, respondent, and Interstate Commerce Commission, intervening respondent, may answer the petition filed in the above entitled cause be, and the same is hereby, extended to and including September 16, 1912.

MARTIN A. KNAPP,
Presiding Judge.

In The United States Commerce Court.

ROBERT D. BENSON, WILLIAM S. BENSON, of Passaic, New Jersey, Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., of New York City, New York, Oscar L. Hascy, of Albany, New York, Robert McKelvy, of Titusville, Pennsylvania, and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of The Tide Water Pipe Company, Limited, petitioners.

v.

UNITED STATES OF AMERICA, respondent.

No. 77.

ANSWER OF THE UNITED STATES.

Comes now the United States of America by its counsel and for answer to the petition filed herein against it says:

I. Respondent admits the petitioners named are members of a partnership organized under the laws of the State of Pennsylvania and are doing business under the name of The Tide Water Pipe Company (Limited), as alleged, and that it was formed in 1878 for the term of twenty years and was reorganized in November, 1908, for a further period of twenty years.

One of the features of the partnership is that it has officers and managers and $625,000 of stock, or about that amount.

II. Respondent admits that The Tide Water Pipe Company (Limited) has no charter as a corporation and no franchises as such, but denies that no State or Federal law extends to the company any rights or franchises; and denies that said company has no right of eminent domain and that all its lines have been built upon private right of way acquired by purchase. Respondent alleges that The Tide Water Pipe Company (Limited) has for long distances—the exact distances this respondent is unable at this time to state—laid its said lines along the streets of the municipalities and the public highways of the various counties and States through which the said pipe lines run and has secured from the officers and public officials charged with the supervision of the said streets and highways the right to lay and maintain the said pipe line upon said streets and highways upon terms and conditions so reasonable as to be practically without cost to The Tide Water Pipe Company (Limited). Respondent alleges that with the use of the said streets and highways aforesaid in laying, maintaining, and operating its pipe line The Tide Water Pipe Company (Limited) has been able to construct and operate the same at a very much less cost than it otherwise would have been able to do.

III. Respondent admits the allegations contained in Paragraph III of the petition.

IV. Respondent denies the allegations contained in Paragraph IV of the petition and each and every part of the same.

V. Respondent denies the allegations contained in Paragraph V of the petition and each and every part of the same.

VI. Respondent admits that The Tide Water Oil Company was organized under the laws of the State of New Jersey in 1888, and has a refining plant located at Bayonne, New Jersey. As to the refining plant having a capacity equal to the entire capacity of the pipe line, this respondent says it has no knowledge, and it neither admits nor denies the same, and if it shall become material upon the hearing, it will require strict proof thereof.

VII. Respondent admits that the Tide Water Oil Company has large sums invested in a refining plant at Bayonne, New Jersey, and that the petitioners are owners of stock in The Tide Water Oil Company; but as to the amount invested being many millions of dollars and the petitioners being large owners of such stock, this respondent has no knowledge, and it neither admits nor denies the same; if the same becomes material upon the hearing, it will require strict proof thereof.

VIII. Respondent denies the allegations contained in Paragraph VIII of the petition and each and every part of the same.

IX. Respondent says that it has no knowledge of the matters and things alleged in Paragraph IX of

the petition, and if the same becomes material upon the hearing it will require strict proof thereof.

X. Respondent admits that the petitioners are interested as owners in large acreage of oil-producing property in the States of Pennsylvania and Illinois, but this respondent alleges that there are a vast number of other producers of crude oil in said States who are likewise interested in large acreage of oil-producing property in said States. As to the crude oil which is carried by the pipe line of the petitioners to the said refinery and the pipe line being worked to its full capacity in delivering the oil which the petitioners so produce and purchase, this respondent alleges that the petitioners by means of and through the ownership and control of the said pipe line and preventing the use thereof for the transportation of any oil other than their own are enabled to shut the said other producers out of any market whatever for their said crude oil except through the petitioners. It is by such illegal and unlawful means that the petitioners are enabled to work the said pipe line to its full capacity with their own oil and which they compel the producers to sell to them. By such means the petitioners destroy interstate trade and commerce and place upon the same unreasonable limitations and restrictions. Respondent alleges that the number of producers and refiners of crude oil who are thus shut out of the market are few in number compared to the general public. The general public, excepting the few engaged in producing, selling, and refining crude oil, would have no reason to use and would not use the

said pipe lines. Respondent denies that to require the petitioners to transport oil for others producing the same will in so much deprive the owners of the use of the said pipe line property, as they may make reasonable rates and charges for such use of the same.

XI. Respondent denies the allegations contained in Paragraph XI of the petition and each and every part of the same, and alleges that in transporting the crude oil of others producing the same the petitioners could discharge their duties and obligations as a common carrier by pipe line without being obliged to transport the crude oil of others in a manner other or different than they transport crude oil for themselves.

XII. Respondent denies the allegations contained in Paragraph XII of the petition and each and every part of the same, and alleges that if it be true that to its owners the said pipe line has a peculiar adaptation to the property in which the petitioners have a common interest and connects their oil-producing wells with the refinery, such a condition has been brought about through an arrangement, scheme, or device on the part of the petitioners in a way by which they may act and operate as common carriers and throttle interstate trade and commerce, and place unreasonable restrictions and limitations upon the same, and at the same time divest themselves of their obligations as a common carrier engaged in commerce among the several States. Respondent denies that the petitioners own or operate a refinery.

XIII. Respondent admits the allegations contained in Paragraph XIII of the petition and each and every part of the same, except that this respondent denies that the facts set forth in the said petition, and referred to as the foregoing facts, were shown by competent and uncontradicted evidence before the Interstate Commerce Commission.

Respondent alleges that at the hearing in the proceeding entitled "In the Matter of Pipe Lines No. 4199," at which the petitioner herein was represented by its counsel, it was stipulated and agreed that the Interstate Commerce Commission, in the inquiry then being conducted in the said proceeding, might examine into and review the parts of the record and proceedings relating to pipe lines, had and taken in a certain cause in equity entitled *United States of America* v. *Standard Oil Company of New Jersey et al.*, to which the petitioner was a party, commenced in the Circuit Court of the United States, Eastern District of Missouri, Eastern Division, the same being No. 5371 on the docket of said court. The opinion and judgment of the said circuit court is reported in 173 Federal Reporter, page 177, and the opinion and judgment of the Supreme Court of the United States on the appeal of the Standard Oil Company of New Jersey et al. from the said judgment of the circuit court is reported as *The Standard Oil Company of New Jersey et al.* v. *The United States*, 221 United States Reports, page 1. Said parts of the record and proceedings relating to pipe lines and the said opinions and judgments in said cause were thus

before the Interstate Commerce Commission at the time it entered its said order sought to be set aside and annulled and the said commission did inquire into the same or such parts thereof as it deemed pertinent in the premises.

XIV. Respondent denies the allegations contained in Paragraph XIV of the petition and each and every part of the same.

XV. Respondent admits that if the said order of the Interstate Commerce Commission should be made effective and should be enforced it would compel the petitioners to hold themselves out as common carriers, and denies each and every other allegation in the said paragraph contained. It alleges that if the petitioners are compelled to hold themselves out as common carriers that those other than the petitioners who are producing and selling crude oil and who will make use of said pipe line as a transportation facility are few in number compared to the general public.

XVI. Respondent denies the allegations contained in Paragraph XVI of the petition and each and every part of the same.

XVII. Respondent admits the Interstate Commerce Commission maintains and intends to maintain its said order and will compel the petitioners to obey the same unless the said order is enjoined, but denies the said order or any part of the same is unlawful or erroneous and is contrary to equity and good conscience and to the manifest wrong and irreparable injury of the petitioners.

XVIII. Respondent alleges that the crude oil produced in the United States is described by "fields," which are known as the Appalachian field, covering parts of the States of New York, Pennsylvania, Kentucky, and Tennessee; the Ohio, Indiana, and Illinois fields, covering parts of these States; the Mid-Continent field, covering parts of the States of Kansas, Oklahoma, and Indian Territory; the Gulf field, covering parts of the States of Louisiana and Texas; and smaller fields in the States of California, Colorado, Wyoming, Michigan, and Missouri; that the annual products of crude oil within the United States, as shown by the official statistics for the calendar year 1910 (the last official statistics available), were 209,556,048 barrels, with a value of $127,896,328, and that the Appalachian field, in and through which the petitioners operate their said pipe line, produces a very large proportion of the total production.

Respondent alleges that the buying, selling, and storing of oil produces a profit or occasions a loss independent of pipe line operations and pipe line transportation. It is entirely within the power of The Tide Water Pipe Company (Limited), without injury or detriment to its business of buying, selling, and storing oil, and independently thereof, to receive, store, transport by pipe line, and deliver, the oil of other producers tendering the same for such purposes at reasonable rates and charges.

Respondent alleges that the methods of arranging the operations of a pipe line as a common carrier would be affected only by the degree of uniformity

in the quality of the oil placed in the pipes by the various shippers. If the oil of different shippers is practically uniform in quality, shippers would ordinarily be willing to turn their oil directly into the common stock and to receive at destination an average mixture. If, on the other hand, the oils from different wells or from different small pools of a field vary widely in quality, two different methods might be pursued. That is to say, the pipe line company might keep shipments of different qualities separate, or an arrangement might be made for differentials in value of the different grades, so that a shipper putting a given grade of oil into the pipe line and receiving at destination an oil of different quality would either pay to or receive from the pipe-line company a sum representing the difference in value. Respondent alleges that if the oil of the Appalachian field is of a quality that for purchasing, transporting, and selling the same it must be kept separate and apart from other grades of oil, that The Tide Water Pipe Company (Limited) is compelled to transport oil in that manner for itself, and in discharging its duties and obligations as a common carrier it would not be obliged to transport the oil of others in any manner other or different than it transports oil for itself.

Respondent alleges that the Texas Company, a corporation, the largest oil company in the United States excepting the Standard Oil Company and its constituent companies, owns and operates a system

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of pipe lines from the Mid-Continent field southward to points in the State of Texas and on the Gulf of Mexico, and is acting as a common carrier of oil by pipe line in commerce among the several States and with foreign nations and has published and filed tariffs in compliance with the act of Congress in such case made and provided, and is receiving, transporting, and delivering oils of various grades and qualities through the same pipe without any material mixture when reasonable care is taken, and that it is entirely practicable so to transport such different grades of oil.

Respondent alleges that the Gulf Pipe Line Company, which has a pipe line extending from the Mid-Continent field, in the State of Oklahoma, to Port Arthur, in the State of Texas, is acting as a common carrier of oil by pipe line in commerce among the several States and with foreign nations and has published and filed tariffs in compliance with the act of Congress in such case made and provided, and is receiving and transporting oil through the same pipe and is making deliveries of a like quantity of a like quality of oil, and that it is entirely practicable so to do.

Respondent alleges that there are other persons, firms, and corporations in certain of the States of the United States and in the Appalachian field acting as common carriers of oil by pipe line in commerce among the several States and with foreign nations, and have published and filed tariffs in compliance with the act of Congress in such case made and provided, and are receiving, transporting, and delivering oils of various grades and qualities through the same

pipe without any material mixture when reasonable care is taken, and that it is entirely practicable to so transport such different grades of oil.

Respondent alleges that the cost of transportation of crude oil by pipe line from the Appalachian field is but a small fraction of the cost of transportation of crude oil by railroad. By reason thereof, common carriers by railroad are unable to compete with pipe line companies in the transportation of oil. Producers of crude oil who do not own and operate a pipe line and who are deprived of the use thereof as a means of transportation are without means of transportation except by railroad. The rates and charges of railroad companies are such that producers of crude oil may not compete with other producers and sellers of crude oil who own and operate pipe lines and the producers and sellers of crude oil without the use of pipe lines have no alternative but to sell their products to the producers and purchasers of crude oil who own and operate pipe lines, at such prices as the owners of the pipe lines may dictate and upon such terms and conditions as they may impose.

Respondent alleges that in the purchase of crude oil in the Appalachian field from the producers and sellers thereof other than the petitioners, the petitioners by reason of their ownership of the pipe line, and the power wielded by them in the use of the same, are enabled to and do prefer some localities and discriminate against other localities in the Appalachian field in the purchase of crude oil by the fixing of prices and

the payment of premiums in some localities to some producers and sellers of crude oil in order to prevent the sale of the same to others who are competitors of the petitioners or competitors of its principal patron, the Tide Water Oil Company. The petitioners reduce the purchase price in other localities so low as to make the business of producing and selling of crude oil unprofitable, as the producers and sellers thereof have no other market or outlet for their product than to sell the same to petitioners. By means of their ownership and control of the pipe line as aforesaid, and the power wielded by the petitioners in the use of the same, they are enabled to and do control the supply and demand of a large portion of the crude oil of the Appalachian field.

Respondent alleges that the Tide Water Oil Company is a large corporation organized under the laws of the State of New Jersey, having a capital stock of $19,967,000, and owns and operates refineries at Bayonne, New Jersey, on New York Harbor, and is engaged in the business of producing crude oil, refining the same, and selling the refined products thereof. Part of the capital stock of said company was until quite recently owned by the Standard Oil Company of New Jersey. The Tide Water Oil Company and the Tide Water Pipe Company (Limited) are two separate and distinct organizations with their fields of operation and places of business widely separated. The pipe line company is engaged in producing oil from its own fields in the Appalachian field and in purchasing oil from other producers and in trans-

porting oil by pipe line to Bayonne, New Jersey, and selling the same, either before or after it is transported to the Tide Water Oil Company. The Tide Water Oil Company is engaged in purchasing crude oil from the Tide Water Pipe Company, either before or after it is transported, refining the same, and selling the refined products thereof in the market. The pipe company serves the oil company as carrier and the oil company serves the pipe company as purchaser and shipper. While the exact quantity of oil thus handled by the two companies is unknown to respondent, it is informed and believes, and upon such information and belief, it charges as a fact, that such quantity of oil amounts to several million barrels annually.

Respondent further alleges that The Tidewater Pipe Company (Limited) purchases and transports oil only for itself and for the Tide Water Oil Company, to the exclusion of all other producers of oil. Through arrangements with the oil company the pipe company is able to compel the producers of crude oil to sell the same at very low prices and is able to secure the crude oil and to transport the same at very low cost. The pipe company is able to keep control of the prices, supply, and demand of crude oil at figures so low and upon such terms and conditions as to make the business of the oil company in purchasing crude oil, refining the same, and selling the refined products thereof, immensely profitable to it, to the great benefit and advantage of the two companies and to the great injury and

damage of the producers and sellers of crude oil, who are without any market or outlet for their oil other than to the petitioners at the prices dictated by the petitioners.

Respondent alleges that the power wielded by The Tide Water Pipe Company (Limited) with the use of the pipe line in purchasing crude oil in the Appalachian field at such prices as it may dictate and upon such terms and conditions as it may impose, and the transportation thereof to tidewater and the purchase of the crude oil from the pipe company by the Tide Water Oil Company, either before or after the same is transported, at such prices and upon such terms and conditions as they may agree upon, constitute an arrangement, scheme, or device wherein and whereby they are enabled to throttle and control interstate trade and commerce and place unreasonable restrictions and limitations upon the same, by means of which the oil company, for which the crude oil is transported and to which it is sold by the pipe company, is able to have its entire supply of crude oil delivered at its plant for refining and nearby market at very low cost to it, and the pipe company is able to and does unduly prefer itself as a shipper and seller of crude oil, if the oil is paid for after it is transported, and is enabled to and does unduly prefer the Tide Water Oil Company as a shipper and purchaser of crude oil, if the oil is paid for before it is transported, to the utter exclusion of other producers of crude oil, all to the great advantage and profit to both the pipe company and the oil company,

and which results in undue preferences in favor of the pipe company and the oil company and unjust discriminations against the other producers of oil, in violation of the acts to regulate commerce.

Respondent alleges that The Tide Water Pipe Company (Limited) is combining the business of producing, purchasing, and selling crude oil and otherwise dealing therein with the business of transporting the same in interstate commerce, which results in a natural tendency to prefer and discriminate, and in thus combining the business of producing, purchasing, and selling crude oil and otherwise dealing therein with the business of transporting the same in interstate commerce, and its refusal to divorce the business of transporting crude oil in interstate commerce from the producing, purchasing, and selling thereof, and thus to avoid the natural tendency to prefer and discriminate, The Tide Water Pipe Company (Limited) working in conjunction with the Tide Water Oil Company, by arrangement, scheme, or other device, is enabled to effectively control a substantial proportion of the production and sale of crude oil and the transportation thereof from the Appalachian field eastward, to the great prejudice and disadvantage of other producers of crude oil in the Appalachian field who are without any outlet or market for their said product except by selling the same to The Tide Water Pipe Company (Limited), as aforesaid. In failing to publish and file its tariffs of rates and charges and to receive and transport crude oil for

the other producers in the Appalachian field in accordance therewith, and upon equal terms and conditions with it and with each other, it is enabled to compel such producers to sell the crude oil produced by them to it at such prices as it may dictate and upon such terms and conditions as it may impose, and in so doing it does make and will continue to make undue preferences in favor of and unjust discriminations against communities and persons in the Appalachian field and avoid the provisions of an act entitled "An act to regulate commerce," approved February 4, 1887, and the various acts amendatory thereof and supplementary thereto, and particularly avoid regulation by the Interstate Commerce Commission.

Respondent alleges that the pipe lines of The Tide Water Pipe Company (Limited), by connections in the Appalachian field, with pipe lines of the Standard Oil companies, form a part of one continuous system of pipe lines from the Mid-Continent field to the Atlantic Ocean and to the Gulf of Mexico. The pipe lines of The Tide Water Pipe Company (Limited), by reason of such connections with pipe lines of the Standard Oil companies form a part of a system of pipe lines aggregating approximately 40,000 miles, covering completely the Appalachian, Lima-Indiana, Illinois, and Mid-Continent fields, with great trunk lines running to the seaboard and the Gulf of Mexico and to the great markets and distributing centers where the large refineries of the Standard Oil com-

panies are located, including the refinery of The Tide Water Oil Company (Limited), at Bayonne, N. J.

Respondent alleges that in pursuance of an act of the Legislature of the State of Pennsylvania passed May 22, 1878, and various other acts of the Legislature of the State of Pennsylvania passed previously and subsequently thereto, and certain decisions of the courts of the State of Pennsylvania, including the Supreme Court, wherein and whereby the public policy of the State of Pennsylvania in this behalf was declared and became established, all companies engaged in the general business of receiving, transporting and delivering crude oil by pipe line within the said State became and are common carriers of crude oil by pipe line and are subject to certain statutes of the State of Pennsylvania relating to petroleum and to common carriers. Respondent alleges that in pursuance of an act passed March 12, 1872, by the Legislature of the State of Pennsylvania relating to companies for the transportation and storage of petroleum, which said act has been in full force and effect since that date, pipeline companies were authorized and empowered to exercise the right of eminent domain under the constitution and laws of the State of Pennsylvania, and all the rights and privileges appertaining thereto. Respondent alleges that by reason of the said several acts of the Legislature of the State of Pennsylvania and the decisions of the courts of that State, including the Supreme Court, the public policy of the State of Pennsylvania has become declared and established that transportation of crude oil by means of pipe

line is not a private service for private persons but a public service for public purposes. Respondent alleges that the business of transporting oil from the Appalachian field by means of pipe lines to the Atlantic Ocean by the petitioners is, under the public policy of the State of Pennsylvania, as declared by its statutes, a service of which the public is entitled to the benefit and in which it is entitled to share. Respondent alleges that for a long time prior to the year 1906 The Tide Water Pipe Company (Limited), petitioner herein, while conducting the business of purchasing, transporting and selling crude oil, did hold itself out to the public as a common carrier of crude oil in interstate commerce by means of pipe line, and did offer to receive, transport and deliver crude oil for other persons, firms and corporations, as a common carrier in interstate commerce by means of pipe line from the Appalachian field to Bayonne, New Jersey, and did, during said time, as such common carrier, publish its tariffs of rates and charges for the transportation of crude oil by means of pipe lines between said points.

Respondent alleges that at the hearing in the proceeding entitled "In the Matter of Pipe Lines No. 4199" the matters and things in this answer by this respondent alleged were made fully to appear to and were before the Interstate Commerce Commission in the inquiry then being conducted in the said proceeding.

Respondent alleges that The Tide Water Pipe Company (Limited), The Ohio Oil Company, Standard Oil

Company of New Jersey, Standard Oil Company of Louisiana, and The Prairie Oil and Gas Company, which are commonly known as "Standard Oil companies," are all directed by the said order of the Interstate Commerce Commission, which is a joint order, to file with the Commission, on or before November 1, 1912, schedules of their rates and charges for the transportation of oil, in compliance with the provisions of the act to regulate commerce. Each has filed in this court its separate petition for an injunction against the said joint order of the Interstate Commerce Commission and for an order annulling and suspending the same. Respondent alleges that The Tide Water Pipe Company (Limited), petitioner herein, and the other companies above named are all interested, either directly or indirectly, in the case of each of said companies; and for the purpose of showing the relation existing among the said companies or between any two or more of them, this respondent prays leave to refer to the petitions and answers and other records and proceedings in said causes or any of them.

Respondent alleges that the Congress of the United States, in pursuance of its power to regulate commerce, by an act entitled "An act to regulate commerce," approved February 4, 1887, as amended June 29, 1906, whereby the public policy of the United States of America in this behalf was declared and became established, enacted, by section 1 of said act, "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the

transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, * * * who shall be considered and held to be common carriers within the meaning and purpose of this act."

Respondent alleges that, as shown by Exhibit A attached to the petition, complaint was made to the Interstate Commerce Commission that a large number of common carriers by pipe line, of which the petitioner was one, had established certain rates, classifications and regulations which were unjustly discriminatory, unduly preferential and prejudicial, and otherwise in violation of the provisions of the act to regulate commerce and the acts amendatory thereof and supplementary thereto, and that the practices of said common carriers, and each of them, in the conduct of business and subject to said act were unjust, unreasonable, unjustly discriminatory, unduly preferential and prejudicial and otherwise in violation of the provisions of said act, and that, by reason thereof, the commission instituted an inquiry on its own motion, and inquired into the matters and things complained of; that after a full hearing the commission notified and required but 12 of the said large number of companies to file with the commission schedules of their rates and charges for the transportation of oil in compliance with the provisions of the act to regulate commerce. Respondent alleges that of the said 12 companies, 7 thereof

have filed petitions seeking to attack the order of the commission in question, and that the 5 remaining companies are engaged extensively in mining, producing, purchasing, selling, receiving, transporting by pipe line and delivering crude oil, and are thus engaged in interstate commerce in the same manner as the petitioner herein. They and each of them are named as parties to the order of the Interstate Commerce Commission, and are by it directed to file their schedules of rates and charges for the transportation of crude oil in compliance with the provisions of the act to regulate commerce. None of said 5 companies has filed a petition in this court to set aside and annul the said order or for an injunction against the same. This respondent is informed and believes, and upon such information and belief it charges, that each of the said remaining 5 companies in said order named is undertaking to comply with the provisions of the said order, and will comply with the provisions thereof if the said order is allowed to remain in force and effect, and will submit itself to the provisions of the act to regulate commerce and to regulation by the Interstate Commerce Commission. Respondent is informed and believes, and upon such information and belief it charges, that if a temporary restraining order is issued herein, or if the said order of the commission is finally annulled and enjoined, many of the other companies investigated by the commission which are complying with the provisions of the act to regulate commerce in such a way as not to require further present action on the part of the commission,

and the other companies named in the order of the commission which have not filed petitions herein, or some of them, will attempt to divest themselves of their obligations and duties as common carriers by pipe lines and avoid regulation as such and that much chaos and confusion will result, to the great prejudice and disadvantage of the producers, shippers and refiners of crude oil throughout various States of the United States.

Respondent alleges that The Tide Water Pipe Company (Limited), a partnership, engaged in commerce among the several States by means of pipe lines, has, since the date of the passage of the said act, refused, and is now refusing, to comply with the provisions of the said act to regulate commerce, and to submit to regulation by the Interstate Commerce Commission, and is standing in defiance of the provisions of the said act and in defiance of the order of the Interstate Commerce Commission. The failure of The Tide Water Pipe Company (Limited) to comply with the provisions of the act to regulate commerce, as directed by the order of the Interstate Commerce Commission, is inimical to the general welfare of the people of the United States, contrary to law, and contrary to the public policy of the United States as declared and established by the Congress.

Respondent denies each and every allegation in the said petition contained not herein specifically admitted, denied, or otherwise traversed.

Wherefore, having fully answered, respondent prays that the petition be dismissed at the cost of the petitioner.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

UNITED STATES OF AMERICA,
District of Columbia, ss.

Blackburn Esterline, being duly sworn, says that he is special assistant to the Attorney General of the United States, and that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes them to be true. He further states that he is authorized to sign the said answer for the United States of America, the respondent in said cause, by the Attorney General of the United States.

BLACKBURN ESTERLINE.

Subscribed and sworn to before me this 16th day of September, A. D. 1912.

[SEAL.] J. H. MACKEY,
Notary Public, District of Columbia.

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53 In the United States Commerce Court.

ROBERT D. BENSON, WILLIAM S. BENSON, of Passaic, New Jersey; Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., of New York City, New York; Oscar L. Hasey, of Albany, New York; Robert McKelvy, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of The Tidewater Pipe Company, Limited, petitioners.	In Equity. No. 77.
v.	
THE UNITED STATES OF AMERICA, RESPONDENT; Interstate Commerce Commission, intervening respondent.	

Answer of the Interstate Commerce Commission.

(Filed September 16, 1912.)

The Interstate Commerce Commission, intervening respondent in the above-entitled cause, now and at all times saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answering, says:

54 I.

This respondent admits that the petitioners named in the petition are doing business under the partnership name of the Tide Water Pipe Company (Limited); that said partnership was created under an act of the General Assembly of Pennsylvania approved June 2, 1874, and the acts supplemental thereto; that the partnership was formed in 1878 for the term of twenty years and was extended, in November, 1898, for a further period of twenty years. This respondent alleges that under the provisions of the act referred to such partnership may issue certificates of capital stock, but only members of the partnership can vote the stock; that the said partnership has a capital stock of $625,000, for which certificates have been issued and are now owned and held by the Tide Water Oil Company hereinafter referred to.

II.

This respondent admits that the petitioners are not a corporation and can not exercise the power of eminent domain. But this respondent denies the allegations in said petition that the petitioners

have no franchises and have not received and are not enjoying such grants from State or Federal law, and this respondent also denies that all of the petitioners' lines have been built upon private right of way acquired by purchase. This respondent alleges that the pipe lines operated by the petitioners at very many points are located upon and cross the right of ways of various railroad companies,
55 which right of ways were originally acquired by public grants or by power of eminent domain, and the same are subject to all the rights, privileges, and powers in such cases retained and vested in the States through which they run, and which rights, privileges, and powers so retained and vested in the States, appertain to, and are superior to, the right of way acquired or occupied by said petitioners' pipe lines; that wherever the pipe lines of the petitioners cross or are laid upon public highways and streets, as is the case in innumerable instances, the privilege to so cross or lay pipes along said highways was granted, or is permitted, by the States respectively in which the same are located, and that the right of way of the said petitioners is subject to all the rights and powers existing in the States over its public highways.

III.

This respondent admits that the petitioners, under the name of the Tide Water Pipe Company (Limited), own and operate a pipe line for the transportation of crude oil extending from points in the State of Pennsylvania to Bayonne, in the State of New Jersey; that the company owns and operates pipe-line branches from its main lines to points in the State of New York and in the State of Pennsylvania; that the company also owns and operates a pipe line extending from Stoy, in the State of Illinois, through the States of Illinois, Indiana, Ohio, to Rixford, in the State of Pennsylvania, all of which are particularly shown upon a map hereto attached and hereinafter referred to. And this respondent alleges that the said company
56 is engaged in the business of transporting crude oil by means of said pipe lines from one State of the United States to other States in the United States; that by reason thereof the petitioners, doing business as aforesaid, are engaged in interstate commerce, which commerce is subject to the regulating power of the Congress of the United States.

IV.

This respondent admits that the petitioning company does not hold itself out as a common carrier, nor does it offer to carry oil for the public except as hereinafter stated; but this respondent alleges that, the premises considered, the said petitioning company is a common carrier by reason of the act of Congress hereinafter referred to. This respondent neither admits nor denies that the capacity of the pipe lines so operated by the petitioning company as aforesaid can not be made to carry more oil than the company uses in its refining business.

This respondent declares that if the facts be as alleged, such facts are and each of them is wholly irrelevant and immaterial to the determination of the matters in controversy in this suit.

V.

This respondent admits that crude oil produced east of the Rocky Mountains is limited in its markets to the refineries for the reason that crude oil is not used to any extent in its natural state within said territory; that heretofore the business of transporting crude oil by pipe lines has been, to a large extent, carried on in connection with
57 and is controlled by refineries, and that, so far as the refinery was concerned, the transportation business was treated as an adjunct or means of securing crude oil at prices fixed by the refinery, as hereinafter stated. This respondent denies that it is necessary, in order to furnish a market for crude oil, that the business of transportation by pipe lines should be associated with the business of refining or that the two should be united in one ownership. On the contrary, this respondent alleges that it is to the interest of the public and is one of the efficient methods of preventing monopoly in oil that the business of transporting should be disassociated from the business of refining crude oil; that this separation of transportation from the business of refining has as a public policy been adopted by many States in the United States and also by the Congress of the United States, as hereinafter set forth.

VI.

This respondent admits that the owners and interests controlling the said Tidewater Pipe Company, in 1888, organized the Tidewater Oil Company under the laws of the State of New Jersey; that the Tidewater Oil Company acquired and established a refinery of large capacity—the capacity thereof is not known to this respondent—at Bayonne, in the State of New Jersey, on what is known as the New York Harbor. This respondent alleges on information, that the Tidewater Oil Company is organized under the laws of the State of New Jersey and has an outstanding capital stock of $19,967,-
58 000, of which capital stock the Standard Oil Company of New Jersey owned $6,210,000, or about 31 per cent thereof, the same standing in the name of H. C. Folger, jr., who is a member of the Tidewater Pipe Company, and one of the petitioners herein; that the purpose of this organization was to enable this refinery, with others controlled by the Standard Oil Company of New Jersey, to arbitrarily fix the price of oil in the fields of production served by the Tidewater Pipe Company and to secure a monopoly in crude oil.

VII.

This respondent denies the allegations that if the Tidewater Pipe Line serves the public as a common carrier such service will prevent the Tidewater Oil Company from obtaining its supply of crude oil

or that the petitioner would suffer great and irreparable damage or injury; on the contrary, this respondent alleges that said pipe line would carry to the refinery aforesaid the same quantity of oil that it now transports, the only difference being that by giving the producers of crude oil a choice of refineries to which they could sell and ship, the petitioners and the interests they represent could not arbitrarily fix the prices of crude oil at points of production as they now do. This respondent denies that the capacity of said pipe line can not be increased. This respondent admits that the petitioners, through either the Tidewater Pipe Line or the Tidewater Oil Company, are interested in oil-producing properties in the States of Pennsylvania and Illinois, but the extent thereof is un-
59 known to this respondent; this respondent admits that crude oil from the properties so owned as aforesaid is carried by the petitioners' pipe line to the refinery of the Tidewater Oil Company. This respondent further alleges that the petitioners and the interests represented by them through the Tidewater Pipe Company or Tidewater Oil Company purchase large quantities of crude oil in the manner hereinafter stated at the wells in the producing territory served by said pipe lines; and that the crude oil purchased by or through the petitioners far exceeds in quantity and value the amount produced by them; that the prices paid for such crude oil are from time to time arbitrarily fixed and posted at points of delivery by the pipe line or refining company; that the producers by reason of the facts hereinafter stated are compelled to accept the price so posted for crude oil delivered, and that by reason of the premises the petitioners created and are attempting to maintain an unlawful monopoly of crude oil.

VIII.

This respondent neither admits nor denies that said refinery is designed and constructed to refine only certain kinds of crude oil, but alleges that if such be the fact, and the petitioners desire to confine the transportation of crude oil from the fields of production to their refinery to the kinds or grades of crude oil so refined by them, such fact does not prevent their conveying such crude oil as common carriers and thereby giving to producers of the same kind or
60 grade an equal opportunity to secure transportation to the markets.

This respondent denies that the pipe lines aforesaid, under existing law, are, so long as they are used for transportation of interstate commerce, private property in the sense that the same are not used for a public purpose.

IX.

This respondent admits and alleges that it made the order complained of, and served the same upon the petitioner; that it conducted the hearing referred to and that the petitioner appeared at said hearing, and then and there submitted a statement of facts substan-

tially as set forth in the petition herein, with oral argument and printed briefs thereon; that after due and full consideration of all the statements of facts, arguments, and briefs submitted by petitioner aforesaid, this respondent, on the 3d day of June, 1912, made, rendered, and published, as required by the act to regulate commerce as amended, its report, findings, and conclusions thereon, and made, entered, and served upon the petitioner the order in controversy; that on July 18th, 1912, at the request of the petitioner and other pipe-line companies, said order was amended by making the effective date thereof November 1st, 1912.

This respondent alleges that said order in question was made after a full hearing by this respondent of all the matters and things involved therein had been given and accorded to the petitioner herein, and after due consideration of all the statements of facts,
61 arguments, and briefs presented to this respondent by said petitioner as aforesaid; that said hearing was instituted and conducted by this respondent in all respects as required by the act to regulate commerce as amended; that notice of the hearing and copies of the reports and orders in controversy were duly served upon the petitioner; and that this respondent was fully empowered and authorized by the act aforesaid to make and enter said order.

A copy of said report entitled "No. 4199, In the Matter of Pipe Lines" is attached hereto, marked "Exhibit A," and the same is hereby made a part of this answer. A copy of the said order in question is also hereto attached, marked "Exhibit B," and made a part hereof.

That for more particular description of the pipe lines of the petitioner, and for the purpose of showing the fields of crude-oil production and the connecting pipe lines east of the Rocky Mountains, a map is hereto attached, marked "Exhibit C," and is made a part hereof.

X.

Further answering, this respondent says:

That the crude oil produced in the United States is described by "fields," and they are known as the Appalachian field, covering parts of the States of New York, Pennsylvania, West Virginia, southeastern Ohio, Kentucky, and Tennessee; the Lima-Indiana and Illinois fields, covering parts of northwestern Ohio, Indiana, and Illinois; the Mid-Continent field, covering parts of the States of Kan-
62 sas and Oklahoma; the Gulf field, covering parts of the States of Louisiana and Texas; the Caddo field, in Louisiana and Texas, and other fields in the States of California, Colorado, Wyoming, Michigan, and Missouri; that the annual production of crude oil within the United States, as shown by the official statistics for the calendar year 1910 (the last official figures available), was 209,556,018 barrels of the value of $127,896,328; that the pipe lines of the petitioner serve the Appalachian and the Lima-Indiana and Illinois fields, as shown by Exhibit C hereto attached.

That crude oil produced east of the Rocky Mountains is not much used in its natural state, and its market is limited to the refineries of crude oil; that heretofore the business of refining the crude oil and transporting it from the fields of production to the refineries has been, to a large extent, transacted under a common management or unified control, the pipe line being called an adjunct of the refinery; that the cost of transportation by means of pipe lines is approximately from 20 to 35 per cent of the cost of transportation by any other instrumentality; that by reason of the premises the producers of crude oil were and are wholly dependent for the sale of the product upon transportation by pipe lines to the refineries, and by reason of their location, as herein described, they could not sell or dispose of their said product except to the refineries controlling pipe lines; that by means of the monopoly created by the control of said pipe lines the refineries were able to and did control the output and
63 arbitrarily fix the price of crude oil at the points of production; that the combining of the business of transporting crude oil with the business of refining the same tended to and did create a monopoly and an unreasonable restraint of trade and subjected the producers of crude oil and the consumers of the refined products thereof to great and unreasonable burdens and restraints in trade, and was and is injurious to the public.

XI.

That prior to the act of Congress hereinafter set forth, as respondent is informed, the Standard Oil Company of New Jersey, through its pipe lines and through the pipe lines of companies in which it was interested and over which it exercised by ownership and contract a dominant control, transported and in its refineries consumed nearly nine-tenths of the crude oil of the Appalachian and Lima-Indiana and Illinois fields; that by virtue of its control of pipeline transportation the said company last named fixed the price of crude oil at the wells of production in the fields aforesaid; that through its ownership of stock in the Tidewater Oil Company and its ownership of a like interest in the Tidewater Pipe Company, petitioner herein, and by virtue of contracts between the Standard Oil Company and the petitioners herein the said Standard Oil Company of New Jersey controlled and fixed the amount of the output of crude oil and prices paid therefor at the wells in said fields by the petitioners herein. That in a certain proceeding in the Supreme Court
64 of the United States entitled Standard Oil Company *v.* United States (221 U. S., 1, 75) it was held that—

"The unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise * * * to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by

new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce."

That by reason of the manner of conducting the business of pipeline transportation as an adjunct of the refineries, the inability and the prohibition upon the producers of crude oil to have their oil transported by pipe lines as common carriers, and thereby enable the producer to select the refinery and markets to which they would ship, the Congress of the United States in the exercise of its plenary power to regulate interstate commerce for the public welfare, and to prevent the monopoly of crude oil, did, by acts approved June 29, 1906, amended June 18, 1910, declare, among other things, as follows:

65 "That the provisions of this act [to regulate commerce] shall apply to any corporation * * * engaged in the transportation of oil * * * by means of pipe lines * * * who shall be considered and held to be common carriers within the meaning and purpose of this act * * *."

And

"That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established."

That by virtue of said act of Congress all persons, firms, or corporations conducting the business of transporting crude oil from the fields of production to the markets by means of pipe lines, where such transportation is from points in one State to points in another State within the United States, are common carriers within the meaning and purposes of the act to regulate commerce; that if and so long as the petitioning company engages in the business of transporting oil by means of pipe lines from points in one State to points in another State by the means and instrumentalities aforesaid, the Tidewater Pipe Company is, by reason of the premises and the provisions of the

66 act of Congress aforesaid, a common carrier, and is expressly required by said act to file with this respondent schedules of rates and charges for the transportation of oil, as provided in said act. That the order in controversy follows, and is strictly within the express requirement of said act of Congress.

XII.

This respondent denies each and every allegation in said petition contained, to the effect that the ability of the petitioner to carry the oil which it produces or owns will be unlawfully interefered with by

segregating its transportation business from the business of producing and refining crude oil, or by full compliance with the order in controversy.

This respondent also denies the allegation that petitioner can not transport crude oil through its pipe line for several owners or shippers; or that it can not make rates for such transportation. On the contrary, respondent alleges that the petitioners, with many other carriers, is sending shipments through connecting pipe lines and delivering single and independent shipments to various stations and refineries upon rates fixed and determined therefor, and that the segregation of such shipments and making separate rates and charges therefor is practicable and of daily occurrence.

This defendant further denies each and every allegation in said petition contained, to the effect or in substance that a compliance with said order will operate to deprive the petitioner of its property without due process of law; or that it will in any degree con-
67 fiscate or take the property of the petitioner for public uses without due compensation; or that it will in any manner whatsoever deprive the petitioner of its constitutional rights, or any of them, guaranteed by the Constitution of the United States.

And this respondent alleges that in the exercise of its sovereign power over the subject of interstate commerce Congress may prohibit or in any manner whatsoever regulate such interstate commerce, and all persons, firms, or corporations, while not compelled to engage in such interstate commerce, are, when so engaged, in duty bound to observe and conform to all laws and regulations for the conduct of such interstate commerce prescribed by Congress or by this respondent under the act to regulate commerce.

This respondent denies that this honorable court has jurisdiction to review or determine the wisdom or expediency of an act of the Congress of the United States involving public policy or public welfare in the regulation of interstate commerce, as prayed in said petition; and this respondent avers that its findings of fact and its determination, set forth in said report and order, are binding and conclusive upon the petitioner and all others concerned therein.

This respondent denies each and every allegation in said petition not herein expressly admitted or which is contrary to the facts stated in this answer or in respondent's said report.

All of which matters and things this respondent is ready to aver, maintain, and prove, as this honorable court shall direct, and prays the same advantage as to each and all the matters and things
68 aforesaid as this respondent would be entitled to if the same were specially pleaded or set forth by way of demurrer or motion to dismiss the petition.

And having fully answered said petition, this respondent prays to be hence dismissed, with its reasonable costs and charges in its behalf sustained.

INTERSTATE COMMERCE COMMISSION,
By CHARLES W. NEEDHAM, *Its Solicitor.*

CITY OF WASHINGTON,
District of Columbia, ss:

C. C. McChord, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named respondent, and makes this affidavit on behalf of said commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true as to the matters within the knowledge of the commission, and as to the other matters he believes it to be true.

C. C. McCHORD.

Subscribed and sworn to before me, George B. McGinty, a notary public within and for the District of Columbia, this 16th day of September, 1912.

[SEAL.]

GEORGE B. McGINTY,
Notary Public.

84 *Order for appearance.*

(Filed October 8, 1912.)

United States Commerce Court.

ROBERT D. BENSON ET AL.
vs.
UNITED STATES. } Case No. 77.

The clerk will enter my appearance as counsel for the petitioner herein.

(Name:) CLARENCE A. FARNUM.
(P. O. address:) WELLSVILLE, NEW YORK.

NOTE.—Must be signed by a member of the bar of the United States Commerce Court. Individual and not firm names must be signed.

85 In the United States Commerce Court.

ROBERT D. BENSON ET AL., PETITIONERS,
against
THE UNITED STATES OF AMERICA, RESPONDENT, AND THE INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 77.

Motion of the Wellsville Refining Company for leave to intervene separately.

(Filed October 29, 1912.)

Comes now C. D. Chamberlin, attorney for and on behalf of the Wellsville Refining Company, and moves the court to intervene separately in the above-entitled cause.

As cause for this motion it is shown—

(1) That a petition for injunction is fined under the provisions of the "Act to regulate commerce," approved February 4, 1887, and the various acts amendatory thereof and supplementary thereto, and the hearing and disposition of the cause will involve the construction of said acts or certain sections thereof and an order of the Interstate Commerce Commission entitled "In the Matter of Pipe Lines," made June 3rd, 1912.

(2) That the Wellsville Refining Company is interested in said order and was a party respondent before the Interstate Commerce Commission.

86 (3) That the intervention is specifically authorized by section 5 of the act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

October 24, 1912.

C. D. CHAMBERLIN,
Attorney for the Wellsville Refining Company.

87 In the United States Commerce Court.

ROBERT D. BENSON ET AL., PETITIONERS,
v.
THE UNITED STATES OF AMERICA, RESPONDENT, AND THE INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 77.

Order of intervention.

(Entered October 29, 1912.)

The Wellsville Refining Company, of Wellsville, New York, having filed and presented its petition for intervention herein and it appearing to the court from the said petition that the petitioner has shown that it has sufficient interest in the proceedings herein to entitle it to intervene and be heard by its counsel:

It is ordered that the Wellsville Refining Company be, and it is hereby, allowed to intervene and become a party intervener and to be heard by its counsel in all the proceedings had and taken in the above entitled cause, the court reserving the right at all times hereafter to enter such other and further order or orders concerning the right of the said intervener to appear and be heard herein, and to enter such rule or rules concerning the pleadings of the said intervener and its course of procedure as to the court shall seem wise and proper.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

88 In the United States Commerce Court.

ROBERT D. BENSON, WILLIAM S. BENSON, DICKSON Q. BROWN, George F. Baker, jr., Henry C. Folger, jr., Oscar L. Hasey, Robert McKelvy, and Willis I. Lewis, partners doing business unde the partnership name of the Tide-Water Pipe Company, Limited, petitioners,
vs.
THE UNITED STATES OF AMERICA, RESPONDENT, AND THE INTERSTATE COMMERCE COMMISSION, intervening respondent. } No. 77.

Petition of intervention of the Wellsville Refining Company.

(Filed October 29, 1912.)

To the honorable judges of said court:

Intervener, the Wellsville Refining Company, humbly complaining against plaintiff and having a material interest in the above cause respectfully shows:

89 1. That the Wellsville Refining Company is a corporation duly authorized and existing under and by virtue of the laws of the State of New York, with authority to produce, purchase, manufacture, and sell petroleum and the products thereof; that it is now, and for a period of more than five years last past has been, engaged in such business by virtue of the authority aforesaid, and maintains, and during said period has maintained, its principal place of business in the city of Wellsville, State of New York, and owns and operates a refinery thereat for the purpose of manufacturing and refining crude petroleum and selling and shipping the same; that it has in connection with its said refinery large tanks for the storage of crude oil, which it uses in the operation of its said business, and that it owns real estate upon which it can construct further storage tanks. Intervener is informed and believes and therefore alleges that petitioners, aforesaid, doing business in the partnership name of the Tide-Water Pipe Company, Limited, own and operate large systems of pipe lines and are engaged in the transportation of petroleum in interstate commerce; that said pipe lines extend from the oil-producing field in the State of Illinois, through the oil-producing field in the State of Ohio, through the oil-producing field in the State of Pennsylvania, and through the oil-producing field in the State of New York, through the State of New York to Bayonne, in the State of New Jersey, and that such pipe lines have

90 a large capacity for the transportation of crude petroleum; that such pipe lines extend through the city of Wellsville, State of New York, where intervener's refinery is located and has its pumping station and the necessary tanks for receiving, storing, and further transporting petroleum and its products in said city of Wellsville, State of New York, and that it is possible by reason of said facilities for petitioners to receive oil into their pipe lines in the

various fields of production and to transport and deliver same in the said city of Wellsville, New York; that intervener can arrange to take delivery from said tanks of petitioners or from the said pipe lines of petitioners into its own storage tanks located at its said refinery; that there are many other systems of pipe lines extending into and through the various fields of production in New York, Pennsylvania, Ohio, Indiana, Illinois, Kansas, and Oklahoma, through which oil can be delivered into the pipe lines, tanks, and other storage and transportation facilities of the said Tide-Water Pipe Company, Limited, and by means of said pipe lines transported to the city of Wellsville, in the State of New York, and elsewhere.

II. Intervener further alleges that the total production of crude petroleum, as shown in the last report of the Department of the Interior for the year 1911, in the Appalachian field (which com-
91 prises the oil produced in the States of New York, Pennsylvania, West Virginia, eastern Ohio, and Kentucky) was 23,749,831 barrels; that said amount is nearly 3,000,000 barrels less than was produced in the preceding year; that in the Lima, Indiana, field, so called, the amount of crude petroleum produced for said year 1911 was 6,231,164 barrels, being over a million barrels less than was produced the preceding year; that in the Illinois field, so called, the amount of crude petroleum produced during the year 1911 was 31,317,038 barrels; that said amount was nearly 2,000,000 less than was produced during the preceding year; that in the Mid-Continent field, so called, as shown in said report for the year 1911, the amount produced was 65,917,788 barrels, said amount being nearly 7,000,000 barrels in excess of that produced during the preceding year; that the average price for which the oil was sold by the producers at the wells was: For the Appalachian field, $1.30 per barrel; for the Lima, Indiana, field, 82 cents per barrel; for the Illinois field, 63 cents per barrel; and for the Mid-Continent field, 48 cents per barrel; that it is necessary for intervener, on account of the diminishing amount of crude oil produced in the near-by fields of production and because of the high price of said oil at its wells, for it to purchase oils in other fields and have the same transported by means of pipe lines at reasonable rates to its refinery at Wellsville, New York.

92 III. That the Interstate Commerce Commission, upon its own motion, instituted an inquiry entitled "In the matter of Pipe Lines, No. 4199," as follows, to wit:

"Interstate Commerce Commission.

"Order.

"At a general session of the Interstate Commerce Commission, held at its office, in Washington, D. C., on the 8th day of June, A. D. 1911.

"Present: Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar C. Clark, James S. Harlan, Charles C. McChord, Balthazar H. Meyer, commissioners.

"No. 4199.

"In the Matter of Pipe Lines.

"Complaint being made to the commission that the carriers hereinafter named, and each of them, have established certain rates, classifications, and regulations which were unjust and unreasonable, unjustly discriminatory, unduly preferential and prejudicial, and otherwise in violation of the provisions of the act to regulate commerce and acts amendatory thereof, and that the practices of said carriers, and each of them, in the conduct of business subject to said act are unjust, unreasonable, unduly discriminatory, unduly preferential, and otherwise in violation of the provisions of said act, and good cause appearing therefor.

"It is ordered that an inquiry be, and the same is hereby, instituted in the above-mentioned matters by this commission, on
93 its own motion, and that the rates, classifications, regulations, and practices of the various corporations and persons engaged in the transportation of oil and other commodities, except water and except natural and artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe line and partly by water, subject to the act to regulate commerce and acts amendatory thereof, and of each of them, to determine whether such rates, classifications, regulations, or practices, or any of them, are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of the provisions of said act, and to determine the manner and method in which the business of said corporations and persons, and each of them, is conducted.

"It is further ordered that the following corporations and persons engaged in such transportation subject to said act to regulate commerce and acts amendatory thereof be, and the same are hereby, made parties respondent to this proceeding, viz:

"The Buckeye Pipe Line Company; The Columbia Pipe Line Company; The Crescent Pipe Line Company; Cumberland Pipe Line Company, Incorporated; Emery Pipe Line; The Eureka Pipe Line Company; Gulf Pipe Line Company; Gulf Pipe Line Company of Oklahoma; Higgins Oil & Fuel Company; Indiana Pipe Line Company; National Transit Company; New York Transit Company; Northern Pipe Line Company; Producers & Refiners Oil Company, Limited; Producers Oil Company, Limited; Pure
94 Oil Company; South West Pennsylvania Pipe Lines; Southern Pipe Line Company; the Texas Company; United States Pipe Line Company; Acme Oil Company; Anchor Oil & Gas Company; Associated Pipe Line Company; Associated Oil Company; Central Oil Company of Los Angeles; Cornplanter Refining Company; Corsicana Refining Company; Dougherty & Son Refining Co., W. H.; Evangeline Oil Company; Franklin Pipe Line Company; Guffey Petroleum Company, J. M.; Gulf Refining Company of Louisiana; Industrial Pipe Line Company; Kansas Cooperative Re-

fining Company; Kansas Crude Oil & Gas Company; Kansas Natural Gas, Oil & Pipe Line Improvement Company; Kasigan Oil, Gas & Power Company; Manhattan Oil Company; the Modelo Oil Company; National Pipe Line Company; National Refining Company; the Ohio Oil Company; Paragon Refining Company; Prairie Oil & Gas Company; Puente Oil Company; Pure Oil Company; Rio Bravo Oil Company; Security Oil Company; Standard Oil Company of California; Standard Oil Company of Kansas; Standard Oil Company of Louisiana; Sun Company; Sun Pipe Line Company;
95 Tide-Water Oil & Pipe Company; Tide-Water Pipe Company, Limited; Uncle Sam Oil Company; Uncle Sam Oil Company of Kansas; Union Oil Company of California; the Union Petroleum Company of Philadelphia; Union Pipe Line Company; Vacuum Oil Company; Wellsville Refining Company.

"A true copy.

[SEAL.] "JUDSON C. CLEMENTS,
"*Chairman.*"

That intervener was duly served with an order to appear at certain hearings thereafter to be held by the Interstate Commerce Commission, at which certain testimony and other evidence was taken and considered by the commission; that on or about the 28th day of March, 1912, a further order was made upon respondents to appear before the said commission in the city of Washington, D. C., on the 10th day of May, 1912, for the consideration and argument of certain questions of law by them propounded; that after due consideration of the evidence and arguments of counsel of the various respondents the Interstate Commerce Commission rendered its opinion upon such questions of law, and thereupon, on the 3d day of June, 1912, made the following order, to wit:

96 "Order.

"At a general session of the Interstate Commerce Commission, held at its office, in Washington, D. C., on the 3d day of June, A. D. 1912.

"No. 4199.

"In the Matter of Pipe Lines.

"This proceeding having been instituted by the commission on its own motion, and investigation having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, That respondents, The Oklahoma Pipe Line Company, The Prairie Oil & Gas Company, Standard Oil Company of Louisiana, The Ohio Oil Company, Standard Oil Company of New

Jersey, The Tide-Water Pipe Company, Limited, United States Pipe Line Company, Producers & Refiners Oil Company, Limited, Pure Oil Company, Pure Oil Pipe Line Company, The National Pipe Line Company, The Uncle Sam Oil Company, and the Uncle Sam Oil Company of Kansas, be, and the same are hereby, notified and required to file with this commission, on or before the 1st day of September, 1912, schedules of their rates and charges for the transportation of oil, in compliance with the act to regulate commerce.

"By the commission.

"[SEAL.]

"JOHN H. MARBLE,
"*Secretary.*"

97 IV. Intervener further alleges that the cost of transportation of crude oil by railroad from the fields of production to its refinery at Wellsville, New York, is so great as to make the refining of oil thus transported unprofitable, and that the cost of transportation of crude oil by pipe line, allowing a reasonable profit to those engaged in such transportation, will not exceed 25 per cent of the cost of the transportation of the same by railroad.

V. Intervener alleges that it is able to buy oil from the producers in all of the various fields aforesaid, and that it is unable, unless petitioners, the Tide-Water Pipe Company, Limited, will transport said oil at reasonable rates in connection with other pipe-line companies from such fields where oil is produced to its refinery at Wellsville, New York, to otherwise transport such oil as it might purchase to its refinery, and that, on account of the reasons aforesaid, it is necessary, to successfully continue its said business, that it should buy oils from other fields of production; that intervener is receiving oil purchased in Allegany County, State of New York, through the lines of other pipe-line companies, but that said production is not sufficient to operate its refinery to its full capacity and for the successful operation of its said business.

Wherefore intervener prays that it may be made a separate party intervener hereto; that this honorable court will dismiss the bill of petitioners, denying its prayer for injunction, and leave it to
98 the operation of law, as provided in the act to regulate commerce, under the jurisdiction of the Interstate Commerce Commission, in obedience to its lawful and just order, and for such other and further relief as may be in accordance with equity.

THE WELLSVILLE REFINING COMPANY,
By A. C. WOODMAN, *President.*
C. D. CHAMBERLIN,
Attorney for Intervener.

STATE OF PENNA.,
County of Philadelphia, ss:

A. C. Woodman, being first duly sworn, deposes and says that he is the president of the Wellsville Refining Company, the above-named intervener; that he has read the foregoing petition and knows

the contents thereof, and that the same is true except as to the matters therein stated to be upon information and belief, and as to those matters he believes them to be true.

A. C. WOODMAN.

Sworn to before me this 14th day of October, A. D. 1912.
[SEAL.] JOSEPHINE M. KELLY,
Notary Public.

(My commission expires January 18, 1913.)

[Endorsed:] Filed United States Commerce Court Oct. 29, 1912. G. F. Snyder, clerk.

99 In the United States Commerce Court.

ROBERT D. BENSON, WILLIAM S. BENSON, OF PASSAIC, New Jersey; Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., of New York City, New York; Oscar L. Hasey, of Albany, New York; Robert McKelvy, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of The Tide-Water Pipe Company, Limited, petitioners, No. 77.

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

Affidavit of Willis I. Lewis in support of motion for preliminary injunction.

(Filed October 31, 1912.)

Willis I. Lewis, being duly sworn, deposes and says that he is one of the individual petitioners in this case and a member of the board of managers of the petitioning company, and is familiar with
100 all of the organization and affairs of the company; that he has read the petition in this case and is familiar with all the facts alleged therein, and that the facts so set forth are true and correct.

The affiant further sets forth that the allegation contained in the first paragraph of the answer of the respondent, to wit, that the entire issue of certificates of the petitioning company is owned and held by the Tide-Water Oil Company, is incorrect; that, on the contrary, each of the individual petitioners is the owner and the holder of stock in his own right.

The affiant further denies, as alleged in the sixth paragraph of the answer of the respondent, that the Tide-Water Pipe Company is organized to enable the refinery referred to, with others controlled by the Standard Oil Company of New Jersey, to arbitrarily fix the price of oil in the fields of production served by the Tide-Water Pipe

Company and to secure a monopoly in crude oil; that, on the contrary, no such purpose obtained in the organization, and the petitioning company has never arbitrarily fixed the price of oil nor been a party to any arbitrary fixing of prices or monopolizing of the production, sale, or transportation of crude oil in any manner whatever.

The affiant further says that it is not true, as alleged in paragraph 17 of the answer of the United States, that in the purchase of crude oil in the Appalachian field from the producers and sellers
101 thereof other than the petitioners, the petitioners, by reason of ownership of the pipe line and the power wielded by them in the use of the same, are enabled to and do prefer some localities and discriminate against other localities in the Appalachian field in the purchase of crude oil by the fixing of prices and the payment of premiums in some localities to some producers and sellers of the crude oil in order to prevent the selling of the same to others who are competitors of the petitioners or competitors of its principal patron, the Tide-Water Oil Company, and further says that no such condition exists or ever has existed in any field or in any business where the petitioning pipe line has operated.

The affiant further says that it is not true, as alleged in the tenth paragraph of the respondent's answer, that the petitioners serve the Lima-Indiana field, and the affiant says that the Lima oil, so called, is a kind of oil that requires special treatment, and has never been used, piped, or dealt in or refined by the petitioners, and to use the said Lima oil in the pipes of the pipe company would contaminate and seriously injure the so-called sweet crude oil handled by the petitioners.

The affiant further states that it is not true, as stated in the answer of the respondent, that the Standard Oil Company of New Jersey, through its ownership of stock in the Tide-Water Oil Company and its ownership in the Tide-Water Pipe Company, the petitioners herein, or by virtue of contracts between the Standard Oil
102 Company and the petitioners herein, control and fix the amount of output of crude oil and prices paid therefor at the wells in said fields by the petitioners herein. On the contrary, the affiant says that the petitioning company has not through any agreement, arrangement, or understanding, or in any manner combined or been controlled by the Standard Oil Company or been a party to the fixing of the amount of output of crude oil and prices paid therefor at the wells, and, further, that in the proceedings mentioned, to wit, The United States of America vs. The Standard Oil Company, the defendant company was discharged from said proceedings, the Circuit Court having the case before it holding that no combination existed between the Standard Oil Company and the petitioners, and the petitioners were discharged in that proceeding.

The affiant further sets forth that it is not true, as alleged in the ninth paragraph of the answer filed by the United States, that the petitioners by means of and through the ownership and control of

said pipe line deprive other producers of any market for their crude oil, and set forth that it is untrue that by such means the petitioners do compel the producers to sell to them. On the contrary, in every field where the petitioning company purchases and transports oil there is very lively competition. For example, in the Allegany, New York, field there is and has been for a number of years many competitors of the petitioners buying and shipping oil from the
103 same field; that in the said Allegany field there is the Wellsville Refining Company, which company has intervened in this case, owning, operating, and controlling an extensive pipe-line system; also the Allegany Pipe Line Company, the Columbia Pipe Line Company, the Fords Brook Pipe Line Company, and the Vacuum Oil Company; that in the Bradford McKean County field, where the petitioners operate, there is the Emery Pipe Line Company, the United States Pipe Line Company, the National Transit Company, the Penn Lubricating Company, and other refiners and pipe-line companies in active competition with the petitioners in the purchase and transportation of oil throughout that field. The only other field in which the petitioners operate is the Illinois field, and the competition there is such that the petitioners have been unable to acquire from producers their requirements in that field.

The affiant denies that any stipulation was ever entered into by anyone representing the petitioners to the effect that the evidence or any part of it connected with the case of The United States vs. The Standard Oil Company et al. should be used or considered in evidence in the pipe-line inquiry instituted by the Interstate Commerce Commission. The affiant, however, is informed and believes that a stipulation was entered into on the part of the commission and the Standard Oil Company of New Jersey that certain testimony taken in the case referred to might be introduced
104 in the record when selected and specified, but that this stipulation was confined to the companies represented by John G. Milburn, to wit, the Standard Oil Company of New Jersey, the Ohio Oil Company, and the Standard Oil Company of Louisiana.

The affiant further sets forth that it is not true, as alleged in the brief of the counsel for the commission, that this pipe line in question connects with the Buckeye Pipe Line at the Ohio State line. On the contrary, the fact is that the Tide-Water line has no connections with any other pipe-line company, does not in any manner form a through or connecting pipe line, but is engaged solely in conveying its own oil through its own pipe line and making deliveries to the sole refinery in which the petitioners are part owners.

The affiant further says that it is not true, as alleged in the final paragraph of the answer by the United States Government, that this company has stood or is standing in defiance of the provisions of the said act and in defiance of the order of the Interstate Commerce Commission. It is true that soon after the act became effective correspondence passed between the commission or members thereof and this affiant in relation to filing schedules of rates. In that corre-

spondence this affiant took the position that the petitioners were not amenable to the act, and asked the commission before that order should hold that this company came under the act a hearing
105 should be had. This correspondence ended in a letter, signed by Commissioner Lane, saying that the matter should be dropped for the present. The correspondence referred to in this statement, according to the best recollection of the affiant, ended in the year 1907, and in all the proceedings instituted by the commission the petitioning company has in no sense taken any attitude of defiance, unless its taking advantage of the Federal statute in this case and coming in a fair and orderly manner before this court can be construed to be in defiance of the commission.

W. I. LEWIS. [SEAL.]

Sworn and subscribed to before me this 31st day of October, 1912.

[SEAL.] G. F. SNYDER, *Notary Public.*

(My commission expires February 14, 1913.)

106 (Filed March 29, 1913. Nunc pro tunc as of October 31, 1912.)

INTERSTATE COMMERCE COMMISSION,
Washington.

I, John H. Marble, secretary of the Interstate Commerce Commission, do hereby certify that the documents hereto attached, and more particularly hereinafter described, are true copies of schedules lawfully filed with the said Interstate Commerce Commission on dates specified below, to wit:

The Texas Company Pipe Line Tariff No. 5, I. C. C. No. 5, filed on May 21, 1908.

National Transit Company Joint Tariff, I. C. C. No. 12, filed on September 25, 1908.

Memorandum of the division of rate named in said I. C. C. No. 12, filed on May 28, 1912.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 25th day of October, A. D. 1912.

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

[Seal of the Interstate Commerce Commission.]

107 T. T. C. No. 5. I. C. C. No. 5.
Cancelling and superseding I. C. C. Nos. 1, 2, 3, and 4.

THE TEXAS COMPANY.

PIPE LINE TARIFF.

The rates named by this tariff are for the interstate transportation of crude petroleum by The Texas Company's Oklahoma-Texas Trunk Pipe Line and are subject to the regulations made part hereof and set

forth on page 2, and are expressed in cents per barrel of 42 United States gallons.

From the point in the Glenn Pool (Oklahoma), now established for reception of crude petroleum into The Texas Company's Trunk Line.

To any one of the Texas points named below at the rate indicated in each instance, to wit:

To West Dallas (Texas) Station on said trunk line, at twenty (20) cents per barrel.

To Eleanor (Texas) Station on said trunk line, at twenty (20) cents per barrel.

To Corsicana (Texas) Station on said trunk line, at twenty-five (25) cents per barrel.

To Beaumont (Texas) Station on said trunk line, at thirty-five (35) cents per barrel.

To Port Arthur (Texas) Station on said trunk line, at thirty-seven and one-half (37½) cents per barrel.

Note: All deliveries at destination to customer's vessels, or to customer's tanks connected with The Texas Company's lines, will be subject to a further charge of 2½ cents per barrel.

Note: Upon demand for such appearing the company is prepared to consider proper promulgation of tariffs for intermediate points not covered by this or other tariffs in force.

"Issued under special permission of the Interstate Commerce Commission, No. 5522, of date May 18, 1908."

Issued May 19, 1908. Effective June 1, 1908.

Subject to change under terms of law.

J. S. CULLINAN,
President of the The Texas Company, Houston, Texas.

(Stamp:) Received, Interstate Commerce Commission, 72055, May 21, 1908. Division of Rates & Transportation.

108 THE TEXAS COMPANY.

REGULATIONS.

The Texas Company will undertake interstate transportation of crude petroleum only by its trunk pipe line, receiving and delivering such through its own facilities, and not otherwise, subject to further provisions, as follows:

1. Separate pipeage contracts for shipments, in accord with this tariff, and these regulations covering other proper details, must be executed by the parties a reasonable time before the duty of transportation arises.

2. Crude petroleum will be received subject to the right and to the consequences of mixing such with and delivering such from common stock only, the minimum gravity at time of its reception for transpor-

tation to be 36 degrees Beaume; the usual and proper methods of measurements to apply.

3. Storage incident to and during transportation only is available and can be afforded, and the shipper must provide facilities for receiving the oil at destination.

4. The right to require prepayment or acceptable security for charges is reserved, also satisfactory assurance that the crude petroleum is free from liens and charges, and that the shipper has the right to direct its disposition.

5. No limitations are prescribed at this time as to quantities, but reasonable limits will be required by the terms of pipeage contracts, and in the event of tenders in excess of capacities including outstanding pipeage obligations, the right to reasonably allot and apportion is reserved by The Texas Company, and tender for transportation shall not be good for quantities in excess of such as is already in, or available for immediate delivery into, The Texas Company's pipe lines at the time of such tender.

6. Patrons may use, without additional charge, the company's private telegraph lines for messages incident to the business; The Texas Company, however, not to be liable for delivery of messages away from its offices, nor for delay in transmission, nor for interruption of service.

7. All crude petroleum transported under this tariff is subject to further charges for gathering preliminary to receiving the same into the main trunk line, according to the then existing schedule of such charges which are subject to change and which at present are as follows:

Where the distance is 15 miles or more, 20 cents per barrel.

Where the distance is less than 15 miles but more than 10 miles, 15 cents per barrel.

Where the distance is less than 10 miles, 12½ cents per barrel.

Air line distance to apply in accord with The Texas Company's field maps. If other delivery is desired special arrangements must be made, covering additional charge proportionate to the service rendered, in no case to be less than 2½ cents per barrel.

8. In case of fire destroying any oil in the custody of The Texas Company's Pipe Line department, after oil has been received for transportation, and before the same shall have been delivered to the consignee, the shipper shall stand a loss proportionately, as the amount held for such shipper bears to all the oil, including its own, in the custody of The Texas Company's Pipe Line department at the time of such fire, and shall be entitled to have delivered only such proportion of such shipment as is left after deducting the proper proportion of the loss, as above; but, in such event, shall be required to pay carriage charges only on the quantity of oil delivered—statements of quantities ascertained and computed from the records in the usual manner by The Texas Company shall be accepted as prima facie correct in the adjustment of a loss under this clause.

109

I. C. C. No. 12.
Cancelling and superseding I. C. C. No. 8.

JOINT TARIFF.

[Two copies to be posted at the receiving station, as required by law.]

National Transit Company, in connection with South West Pennsylvania Pipe Lines, F X 3 No. 1; The Eureka Pipe Line Company, F X 3 No. 1; and Southern Pipe Line Company, F X 3 No. 1.

The rates named in this tariff are for the transportation of crude petroleum oil by pipe lines, subject to the regulations named within.

	Rates per bbl. of 42 gallons.
From Nedsky, Pa. (via Morgantown, W. Va.), to Fawn Grove, Pa	32 cts.

In addition to said rate, all oil tendered for shipment to Fawn Grove, Pa., at points in Pennsylvania other than Nedsky, Pa., will be subject to a further charge of 20c. per barrel of 42 gallons each, for gathering and transporting the same to Nedsky.

The rates named in this tariff are subject to change at any time upon the National Transit Co. giving the thirty (30) days' notice required by law.

Issued September 23d, 1908. Effective October 28th, 1908.

GEORGE CHESEBRO,
Secretary National Transit Co., New York, N. Y.

(Stamp:) Received, Interstate Commerce Commission. 125490. Sep. 25 1908. Division of Rates & Transportation.

110

File I. C. C. No. 12.

REGULATIONS.

This company will receive crude petroleum for interstate transportation only to established delivery stations on its own lines and lines of connecting pipe-line companies on the following conditions:

First. It will receive crude petroleum for interstate transportation when the shipper has provided the necessary facilities for receiving said petroleum as it arrives at destination.

Second. Orders for the shipment of any specified kind of such crude petroleum shall only become effective when orders from the shipper, in connection with orders from other shippers, for the same kind and quality of petroleum shall amount in the aggregate to seventy-five thousand (75,000) barrels or more, consigned to the same point of delivery, and, subject to this requirement, orders for shipment shall become operative in the order in which they shall have been received.

Third. It will forward such crude petroleum when there has been tendered to it by the shipper individually or by him and others a quantity of the same kind and quality of crude petroleum amounting in the aggregate to not less than seventy-five thousand (75,000) barrels, all of which shall be consigned for delivery to the same delivery point.

Fourth. All such crude petroleum will be accepted for transportation only on condition that it shall be subject to such changes in quality while in transit as may result from the mixture of said petroleum with other petroleum in the pipe lines or tanks of this or the connecting company or companies.

Fifth. Crude petroleum will only be accepted for transportation when free from all liens and charges.

Sixth. This company is not engaged in the transportation of refined oil, and will not therefore accept the same for transportation.

Seventh. Any patron of this company wishing to send telegrams pertaining to the oil business will be allowed to do so free of charge. This does not include any delivery of telegrams at destination except at the company's office.

111 Memorandum of the division of rate named in joint tariff I. C. C. No. 12, issued by the National Transit Company in connection with South West Pennsylvania Pipe Lines, the Eureka Pipe Line Company, and Southern Pipe Line Company for the transportation of crude petroleum oil from Nedskey, Pa., to Fawn Grove, Pa., effective June 1, 1912.

This memorandum is made in accordance with conference ruling No. 209.

The rate given was from Nedskey, Pa., to Fawn Grove, Pa., at 32 cents per barrel of 42 gallons.

The division of this rate rests on verbal agreement, and is as

	Cents per barrel of 42 gallons.
The Eureka Pipe Line Company	3.83
South West Pennsylvania Pipe Lines	5.07
Southern Pipe Line Company	19.34
National Transit Company	3.76
Total	32.00

S. R. Ball,
Secretary National Transit Company.

Oil City, Pa., *May 27, 1912.*

(Stamp:) Received Interstate Commerce Commission, 34856, May 28, 1912, Division of Tariffs.

112 In the United States Commerce Court.

ROBERT D. BENSON ET AL., PETITIONERS,
v.
THE UNITED STATES OF AMERICA ET AL., RESPONDENTS. } No. 77.

Order for completion of the record.

(Entered March 29, 1913.)

It appearing that copies, duly certified by the Interstate Commerce Commission, of the following tariffs of common carrier pipe line companies, namely, (1) The Texas Company Pipe Line Tariff No. 5, I. C. C. No. 5; (2) National Transit Company Joint Tariff, I. C. C. No. 12; and (3) memorandum of the division of the rates named in said I. C. C. No. 12, were offered by counsel for the United States at the hearing on the motion for preliminary injunction in the above entitled cause and were received and considered by this court, but by oversight were not filed with the clerk,

It is ordered, this 29th day of March, 1913, that said certified copies of said tariffs be filed and made a part of the record in the above-entitled cause, nunc pro tunc, as of October 31, 1912.

MARTIN A. KNAPP,
Presiding Judge.

113 JOURNAL ENTRIES.

No. 75. The Prairie Oil & Gas Company, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

No. 76. The Uncle Sam Oil Company, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

No. 77. Robert D. Benson et al., petitioners, vs. The United States of America, respondent; Interstate Commerce Commission et al., interveners.

No. 78. The Ohio Oil Company, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

No. 79. Standard Oil Company, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

No. 80. Standard Oil Company of Louisiana, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

Proceedings of October 29, 1912.

It was announced by the court that these causes would be heard together. Thereupon all of said causes came on for hear-
114 ing upon the applications for a preliminary injunction and

No. 75 upon the motion of the United States to dismiss, and the arguments of counsel were commenced, Mr. W. S. Fitzpatrick, Mr. W. I. Lewis, and Mr. John G. Milburn appearing on behalf of the petitioners.

Proceedings of October 30, 1912.

Thereupon all of said causes came on for further hearing upon the applications for a preliminary injunction and No. 75 for further hearing upon the motion of the United States to dismiss, and the arguments of counsel were continued, Mr. John G. Milburn appearing on behalf of the petitioners; Mr. Albert L. Wilson on behalf of the Uncle Sam Oil Company, petitioner in No. 76; Mr. Blackburn Esterline on behalf of the United States; and Mr. Charles W. Needham on behalf of the Interstate Commerce Commission.

Proceedings of October 31, 1912.

Thereupon all of said causes came on for further hearing upon the applications for a preliminary injunction and No. 75 for further hearing upon the motion of the United States to dismiss, and the arguments of counsel were concluded, Mr. Charles W. Needham appearing on behalf of the Interstate Commerce Commission, Mr. Winfred T. Denison, Assistant Attorney General, on behalf of the United States, and Mr. John G. Milburn on behalf of the petitioners. Thereupon counsel for the United States was granted leave to file an affidavit, said affidavit to be first submitted to Mr. Milburn.
115 Mr. Milburn, of counsel for the petitioners, was granted leave to file a brief on monopoly within one week, and opposing counsel were given one week thereafter in which to file briefs in reply. Thereupon said causes were taken under advisement by the court.

174 In the United States Commerce Court.

October session, 1912.

ROBERT D. BENSON ET AL., PETITIONERS,
v.
THE UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION AND WELLSVILLE REFINING COMPANY, INTERVENERS. } No. 77.

Order granting preliminary injunction.

(Entered March 14, 1913.)

This cause came on to be heard at this session and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

First. That a preliminary injunction be, and the same is hereby, issued, as prayed for in the petition, against the order of the Interstate Commerce Commission entered June 3rd, 1912, the effective

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date of the same having been extended to March 15th, 1913, notifying and requiring the petitioner to file with the Interstate Commerce Commission schedules of its rates and charges for the transportation of oil, in compliance with the provisions of the act to regulate commerce, a copy of which order is attached to the petition and made a part thereof; and that the said order and its force and effect be, and the same is hereby, suspended, restrained, and enjoined until the further order of the court.

Second. That a duly certified copy of this order be forthwith served by the marshal of this court upon the Attorney General of the United States and the chairman of the Interstate Commerce Commission.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

175 DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 14th day of March, 1913, I served the within order granting preliminary injunction on the chairman of the Interstate Commerce Commission by leaving a certified copy thereof with Alfred Holmead, assistant secretary.

March 14, 1913.

F. J. STAREK, *Marshal.*

DISTRICT OF COLUMBIA, *ss:*

I hereby certify that on the 14th day of March, 1913, I served the within order granting preliminary injunction on the Attorney General by leaving a certified copy thereof with Blackburn Esterline.

March 14, 1913.

F. J. STAREK, *Marshal.*

176 In the United States Commerce Court.

October session, 1912.

ROBERT D. BENSON; WILLIAM S. BENSON, of Passaic, New Jersey; Dickson Q. Brown; George F. Baker, jr.; Henry C. Folger, jr., of New York City, New York; Oscar L. Hasey, of Albany, New York; Robert McKelvy, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of the Tidewater Pipe Company, Limited, petitioners. — No. 77.

v.

THE UNITED STATES OF AMERICA, RESPONDENT, AND INTERSTATE COMMERCE COMMISSION and Wellsville Refining Company, a corporation, intervening respondents.

Petition for appeal.

(Filed March 22, 1913.)

The United States of America, respondent, Interstate Commerce Commission, and Wellsville Refining Company, a corporation, inter-

vening respondents, feeling themselves aggrieved by the interlocutory order or decree of the Commerce Court entered March 14, 1913, granting a preliminary injunction suspending and enjoining the order of the Interstate Commerce Commission until the further order of the court, by their respective counsel, pray an appeal to the Supreme Court of the United States in accordance with section 2 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

The particulars wherein the respondent and the said intervening respondents consider said order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

And the respondent and the said intervening respondents further pray that a transcript of the record, proceedings, and papers
177 on which the said order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

J. C. McREYNOLDS,
Attorney General of the United States.

CHAS. W. NEEDHAM,
Solicitor for Interstate Commerce Commission.

Allowed:

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

178 In the United States Commerce Court.

October session, 1912.

ROBERT D. BENSON; WILLIAM S. BENSON, of Passaic, New Jersey; Dickson Q. Brown; George F. Baker, jr.; Henry C. Folger, jr., of New York City, New York; Oscar L. Hasey, of Albany, New York; Robert McKelvy, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of the Tidewater Pipe Company, Limited, petitioners,	No. 77.
v.	
THE UNITED STATES OF AMERICA, RESPONDENT, AND INTERSTATE Commerce Commission and Wellsville Refining Company, a corporation, intervening respondents.	

Assignment of errors.

(Filed March 22, 1913.)

Come now The United States of America, respondent, and Interstate Commerce Commission and Wellsville Refining Company, a corporation, intervening respondents, by their respective counsel, and in connection with their application for appeal, file the following assignment of errors on which they will rely upon said appeal to the

Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered March 14, 1913, in the above-entitled cause.

The Commerce Court erred:

I.

In holding and adjudging that the amendment of June 29, 1906, to the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, which provides that "the provisions of this act shall apply to any corporation or any person or per-
179 sons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, * * * who shall be considered and held to be common carriers within the meaning and purpose of this act * * *," is unconstitutional and void, as in violation of the fifth amendment to the Constitution of the United States.

II.

In construing the said amendment of June 29, 1906, relating to pipe lines, as a declaration by Congress that all private pipe line companies doing business in interstate commerce shall become and be common carriers subject to the provisions of the act to regulate commerce, and in not construing the said amendment as a declaration by Congress that the transportation of crude oil in interstate commerce by means of pipe lines should thereafter be carried on only by common carriers, subject to the provisions of the act to regulate commerce.

III.

In holding and adjudging that the receiving and storing stations and the market places established by petitioners in the fields of production of crude oil, and the inspecting, grading, measuring, purchasing, and receiving of the oil thereat by petitioners, did not constitute such public receiving and storing stations public markets for the purchase and sale of crude oil and a part of the transportation thereof in interstate commerce subject to regulation by Congress.

IV.

In holding and adjudging that the construction and opera-
180 tion of pipe lines upon and over the public streets and highways and upon and over the rights of way of common carriers by railroad subject to the act to regulate commerce and transporting interstate traffic through said pipe lines did not subject the said pipe line companies to the regulating power of Congress.

V.

In not holding and adjudging that the ownership and operation of the pipe lines by the petitioners and the manner and form in which the same are used in the purchase, transportation in interstate

commerce, and sale of crude oil, and the combining of the business of the transportation of crude oil in interstate commerce with the business of dealing in that commodity, constitute monopoly and monopolistic tendencies, and that Congress has the power to destroy monopoly and to prevent monopolistic tendencies by declaring that the interstate transportation of crude oil by means of pipe lines shall be carried on by common carriers subject to the provisions of the act to regulate commerce.

VI.

In holding and adjudging that the ownership and operation of the pipe lines in question and the manner and form in which the same are used, and the combining of the business of the transportation of crude oil in interstate commerce with the business of dealing in that commodity, do not tend, in the nature of things, to or result in monopoly and monopolistic tendencies, and in not holding that the business methods of the petitioners were adopted and their pipe lines were acquired and operated for the purpose of monopolizing crude oil and controlling the output and price thereof and obstructing the free flow and movement thereof in the channels of interstate commerce.

181 VII.

In not holding and adjudging that the petitioners adopted their manner of doing business for the purpose of obstructing the free flow and movement of crude oil in the channels of interstate commerce, and of thwarting and evading regulation by the Interstate Commerce Commission under the act to regulate commerce, while at the same time carrying on the business of a common carrier of crude oil by means of pipe lines in interstate commerce and controlling the output, purchase, sale, and transportation thereof in interstate commerce.

VIII.

In granting the motion for a preliminary injunction and in suspending and restraining the order of the Interstate Commerce Commission entered June 3, 1912, referred to in the petition; and in not denying the said motion, for that (a) the petition of the petitioners does not set forth any cause of action and is insufficient to warrant the granting of the preliminary injunction or to form the basis for any relief from the said order; (b) nor have the said petitioners shown that there is any equity in the said petition upon which to grant the preliminary injunction or to form the basis for any relief from the said order; (c) nor have the petitioners shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) nor have the

petitioners shown that in making its said order the Interstate Commerce Commission violated any right of the petitioners protected by the Constitution of the United States or any other right of the said petitioners over which this court may exercise jurisdiction.

182 Wherefore the United States and the Interstate Commerce Commission pray that the said interlocutory order or decree of the Commerce Court, entered March 14, 1913, be reversed, annulled, and set aside, and that the petition be dismissed, and for such other and further order as may be appropriate.

J. C. McREYNOLDS,
Attorney General of the United States.
CHAS. W. NEEDHAM,
Solicitor for Interstate Commerce Commission.

183 In the United States Commerce Court.

October session, 1912.

ROBERT D. BENSON, WILLIAM S. BENSON, of PASSAIC, New Jersey; Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., of New York City, New York; Oscar L. Hasey, of Albany, New York; Robert McKelvy, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of the Tidewater Pipe Company, Limited, petitioners,

v.

THE UNITED STATES OF AMERICA, RESPONDENT, AND Interstate Commerce Commission and Wellsville Refining Company, a corporation, intervening respondents.

No. 77.

Order allowing appeal.

(Entered March 22, 1913.)

In the above-entitled cause the United States of America, Interstate Commerce Commission, and Wellsville Refining Company, a corporation, having made and filed their petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered March 14, 1913, and having made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such cases made and provided—

It is ordered and decreed, That the said appeal be, and the same is hereby, allowed as prayed and made returnable on the twenty-first day of April, A. D. 1913; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, papers, and proceedings to the Supreme Court of the United States.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

184 United States Commerce Court.

ROBERT D. BENSON ET AL., PETITIONERS,
v.
THE UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION, WELLSVILLE REFINING COMPANY, interveners. | No. 77.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 183, inclusive) to be a true and complete transcript of the proceedings had and papers filed in the above-entitled cause as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 4th day of April, A. D. 1913.

[SEAL.]

G. F. SNYDER, *Clerk.*

185 (Original.)

Citation on appeal.

United States of America, ss. to Robert D. Benson, William S. Benson, of Passaic, New Jersey; Dickson Q. Brown, George F. Baker, jr., Henry C. Folger, jr., of New York City, New York; Oscar L. Hascy, of Albany, New York; Robert McKelvy, of Titusville, Pennsylvania; and Willis I. Lewis, of Coudersport, Pennsylvania, partners doing business under the partnership name of The Tidewater Pipe Company, Limited:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States Commerce Court, wherein the United States of America, Interstate Commerce Commission, and Wellsville Refining Company, a corporation, are appellants and you are appellees, to show cause, if any there be, why the interlocutory order or decree rendered against the said appellants as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Martin A. Knapp, presiding judge of the United States Commerce Court, this 22d day of March, in the year of our Lord nineteen hundred and thirteen.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this second day of April, A. D. 1913.

W. I. LEWIS,
Solicitor for Appellees Robert D. Benson et al., Doing Business as The Tidewater Pipe Company, Limited.

186 In the Supreme Court of the United States.

October term, 1913.

THE UNITED STATES OF AMERICA ET AL., APPELLANTS,
v.
ROBERT D. BENSON ET AL., DOING BUSINESS AS TIDEWATER PIPE COMPANY, LIMITED, appellees. } No. 1055.

Stipulation.

It is hereby stipulated and agreed by and between the parties, by their respective solicitors, that the following documents contained in the record need not be printed, viz: Opinion of the Commerce Court, announced and filed March 11, 1913; report of the Interstate Commerce Commission in the proceeding entitled "In the Matter of Pipe Lines, No. 4199"; and that upon the hearing the court and the counsel may refer to and use the printed copies of the said documents and each of them which have been filed by the appellants in United States of America et al. *v.* The Ohio Oil Company, No. 1012, to all intents and purposes as though printed in the record herein.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

CHAS. W. NEEDHAM,
Solicitor for Interstate Commerce Commission.

W. I. LEWIS,
Solicitor for Robert D. Benson et al., Doing Business at Tide-water Pipe Company, Limited, Appellees.

187 (Indorsed:) File No. 23630. Supreme Court United States. October term, 1912. Term No. 1055. The United States et al., appellants, vs. Robert D. Benson et al. Stipulation to omit part of the record in printing. Filed April 23, 1913.

(Indorsement on cover:) File No. 23630. United States Commerce Court. Term No. 1055. The United States of America, Interstate Commerce Commission, and Wellsville Refining Company, appellants, vs. Robert D. Benson et al., partners doing business under the partnership name of The Tidewater Pipe Company, Limited. Filed April 10, 1913. File No. 23630.

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Office Supreme Court, U. S.
FILED.
MAR 19 1913
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1912.

UNITED STATES OF AMERICA ET AL.
v.
THE OHIO OIL COMPANY.
No. 481

UNITED STATES OF AMERICA ET AL.
v.
STANDARD OIL COMPANY.
No. 482

UNITED STATES OF AMERICA ET AL.
v.
STANDARD OIL COMPANY OF LOUISIANA.
No. 483

APPEAL FROM THE UNITED STATES COMMERCE COURT.

Motion to Advance.

Come now The Ohio Oil Company, Standard Oil Company and Standard Oil Company of Louisiana, respectively defendants in error in the above entitled

causes, and say that they do not oppose the motion to advance said causes, but ask a reasonable time within which to prepare briefs and otherwise to prepare for the argument; and they respectfully suggest that such a reasonable time would be not less than six (6) weeks, for the following reasons, to wit:

1. The interlocutory orders appealed from by the United States and other plaintiffs in error were entered only on March 14th instant, and the citations on appeal were received by the defendants in error only on March 17th instant, the decision of the United States Commerce Court in these causes having been handed down on March 12th instant.

2. The appeals present a grave constitutional question, which, for proper presentation to the Court, requires very careful consideration and preparation. This question is substantially:

Whether the owners of private pipe lines who have never carried any oil but their own, have never held themselves out as common carriers, and are not organized under and derive no powers from State laws under which common carrier corporations are organized, were, by the provisions of the Interstate Commerce Act, as amended June 29th, 1906, subjected to that Act and charged with the duties and obligations of common carriers.

The Court below, construing the Act as embracing within its terms the owners of such private pipe lines,

held that, as to them, the Act was in violation of the Fifth Amendment of the Constitution of the United States.

March 18th 1913.

JOHN G. MILBURN,
Of Counsel for The Ohio Oil Company, Standard Oil Company and Standard Oil Company of Louisiana.

M. F. ELLIOTT,
CHESTER O. SWAIN,
Of Counsel for Standard Oil Company and Standard Oil Company of Louisiana.

FRANK L. CRAWFORD,
WALTER F. TAYLOR,
Of Counsel for The Ohio Oil Company.

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Nos. 481, 482, 483, 506, 507, 508.

In the Supreme Court of the United States

Supreme Court, U. S.
FILED.
SEP 25 1913
JAMES W. McKENNEY,
CLERK.

OCTOBER TERM, 1913.

No. 481. THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CORNPLANTER COMPANY, APPELLANTS,

v.

THE OHIO OIL COMPANY.

No. 482. THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

STANDARD OIL COMPANY.

No. 483. THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

STANDARD OIL COMPANY OF LOUISIANA.

No. 506. THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

PRAIRIE OIL & GAS COMPANY.

No. 507. THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE UNCLE SAM OIL COMPANY.

No. 508. THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WELLSVILLE REFINING COMPANY, APPELLANTS,

v.

ROBERT D. BENSON ET AL., PARTNERS DOING BUSINESS UNDER THE PARTNERSHIP NAME OF THE TIDEWATER PIPE COMPANY, LTD.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

CHARLES W. NEEDHAM,
Assistant Solicitor.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1913

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

Nos. 481, 482, 483, 506, 507, 508.

No. 481. THE UNITED STATES OF America, Interstate Commerce Commission, and Cornplanter Refining Company, Appellants,
v.
THE OHIO OIL COMPANY.

No. 482. THE UNITED STATES OF America and Interstate Commerce Commission, Appellants,
v.
STANDARD OIL COMPANY.

No. 483. THE UNITED STATES OF America and Interstate Commerce Commission, Appellants,
v.
STANDARD OIL COMPANY OF LOUISIANA.

No. 506. THE UNITED STATES OF America and Interstate Commerce Commission, Appellants,
v.
PRAIRIE OIL & GAS COMPANY.

No. 507. THE UNITED STATES OF America and Interstate Commerce Commission, Appellants,
v.
THE UNCLE SAM OIL COMPANY.

No. 508. THE UNITED STATES OF America, Interstate Commerce Commission, and Wellsville Refining Company, Appellants,
v.
ROBERT D. BENSON ET AL., Partners doing business under the partnership name of The Tidewater Pipe Company, Ltd.

Appeals from the United States Commerce Court.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

QUESTIONS INVOLVED.

These cases involve the construction and constitutionality of an act of Congress, approved June 29, 1906, amending section 1 of the act to regulate commerce, bringing the interstate transportation of oil by pipe lines under the act, and declaring that the agents of such commerce "shall be considered and held to be common carriers within the meaning and purpose of this act."

LEGISLATIVE REASONS.

The moving cause of this legislation was to prevent the monopoly of petroleum by the practice—(1) of pipe lines buying crude oil at the wells, for the Standard Oil Company's refineries, at arbitrary prices fixed by the Standard Oil Company; (2) of pipe lines refusing to transport any oil unless the title to the oil was vested in the pipe line, the producer agreeing to accept therefor the price so fixed; and (3) of the pipe lines refusing to deliver crude oil to independent refineries.

APPEALS.

These appeals were taken from the interlocutory decrees of the Commerce Court granting preliminary injunctions restraining the enforcement of an order entered by the Interstate Commerce Commission on the 3d day of June, A. D. 1912. The order was entered in a proceeding then pending before the Commission entitled "In the matter of Pipe Lines" (No.

4199). In that proceeding the appellees, with others, were made respondents (Rec., No. 481, pp. 7 and 8), and they appeared and were given a full hearing. A report was made by the Commission giving its conclusions as required by law. (Rec., 481, p. 45; 24 I. C. C. Rep., 1.)

THE COMMISSION'S ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3d day of June, A. D. 1912.

No. 4199.

IN THE MATTER OF PIPE LINES.

This proceeding having been instituted by the Commission on its own motion, and investigation having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That respondents, The Oklahoma Pipe Line Company, The Prairie Oil & Gas Company, Standard Oil Company of Louisiana, The Ohio Oil Company, Standard Oil Company of New Jersey, The Tidewater Pipe Company, Limited, Producers & Refiners Oil Company, Limited, United States Pipe Line Company, Pure Oil Company, Pure Oil Pipe Line Company, The National Pipe Line Company, The Uncle Sam Oil Company, and The Uncle Sam Oil Company of Kansas be, and they are hereby, notified and required to file with this Commission, on or before the 1st day

of September, 1912, schedules of their rates and charges for the transportation of oil, in compliance with the provisions of the act to regulate commerce. (Record No. 481, pp. 8, 9, and 56.)

It will be observed that this order is nothing more nor less than the requirement, relating to rates, in section 6 of the act to regulate commerce. If these pipe lines are subject to the act it was and is their duty to file schedules of their rates as required by the statute.

COMMISSION'S REPORT.

The Commission entered the order against the appellants herein upon findings of fact and conclusions set forth in its said report (Rec., No. 481, p. 45; 24 I. C. C., 1). The report is referred to and made a part of the order. This report found that each appellee was engaged in the transportation of oil by pipe lines from one State to another State in the United States and was a carrier subject to the act.

CONTENTION BY APPELLEES.

The contention of the appellees before the Commission and before the Commerce Court was that they are not common carriers subject to the act because they have not transported and do not hold themselves out to transport, oil for the public, but only transport "their own oil," purchased in the manner hereinafter set forth.

The Commission found, and the answers of the Commission in the Commerce Court alleged, that the

appellees are engaged in the interstate transportation of oil by pipe lines; that such transportation is commerce over which Congress has plenary power; that Congress may determine by what agents such commerce shall be carried; and that, by the said amendment of June 29, 1906, Congress declared that the agents thereafter engaged in carrying on such transportation or commerce "shall be considered and held to be common carriers" under the act. These carriers, were, therefore, ordered to file with the Commission schedules of their rates and charges for the transportation of oil in compliance with the provisions of section 6 of the act to regulate commerce.

AMENDMENT TO SECTION 1.

The essential portion of the amendment to section 1 of the act to regulate commerce, approved June 29th, 1906, involved in this controversy, reads as follows:

> That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil * * * by means of pipe lines * * * from one State, Territory, or District of the United States, to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act.

DECISION BY THE COMMERCE COURT.

The Commerce Court held (1) that the appellees were private pipe-line companies; (2) that Congress had no power to compel them to be common carriers,

nor could it, under its regulating power, deprive them of the right to carry oil, in interstate commerce, as private carriers; (3) that the amendment of 1906 in terms applies to the appellees, "in common with other pipe-line companies of like character and business"; (4) that said act of Congress was therefore "an exertion of power in excess of constitutional limitations"; and (5) that said legislation "invades the rights secured to these petitioners by the fifth amendment."

In reference to the monopoly created by this method of carriage the Commerce Court said:

> It will be observed that the amendment makes no mention of monopoly and therefore does not purport on its face to be a measure for breaking up an alleged monopoly and preventing its continuance. But disregarding the absence of any declared purpose, and taking into account the circumstances under which the amendment was adopted, we may properly consider its validity upon the assumption that the real though undisclosed purpose was to destroy that degree of control of the oil business which is claimed to result from the private ownership of pipe lines and which is asserted to be monopolistic. (Record, 481, p. 121, Op. p. 33.)
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> * * * * *
>
> True, the possession of a pipe line enables its owner to transport his oil to the refinery or other market at very small cost compared with any other means of conveyance. The practical result may be, and in most instances

doubtless would be, that other producers find it to their interest to sell the output of their wells to the owner of the pipe line, and in this sense it may be said that they are obliged to sell to him. Granted that his pipe line give him such command that he is able to control or even fix the selling price of the crude article in that particular field or territory, upon what sustainable theory can it be claimed that other producers are deprived of anything which rightfully belongs to them because they do not or can not provide themselves with the same means of reaching the market? (Rec., p. 125; Op., p. 37.)

* * * * *

In the nature of things one who owns private property of substantial value has an advantage over those not fortunate enough to have similar possessions, and this advantage ranges through all degrees. It frequently results in commercial dominance of precisely the same sort and quite as complete as the alleged monopoly here considered. But the advantage so acquired, whatever its degree, is not monopolistic, nor are we able to see that it has any tendency, much less an inevitable tendency, to bring about the conditions which constitute an unlawful monopoly, except upon the socialistic theory that all private ownership is indefensible and that everything should be held in common. (Rec., p. 126; Op., p. 38.)

* * * * *

It may be that the greater number of oil producers are virtually compelled to sell their

> output to the owners of private pipe lines, because they are unable or unwilling to build pipe lines of their own, or because there are no common-carrier pipe lines to which they have access, but we are quite unable to see how the situation in which such producers are placed gives them the right, or what constitutional power Congress can exert to endow them with the right, to use the private lines of petitioners and other private companies, or how the denial of such use is a monopolistic exclusion or indicates a tendency to monopoly which deprives these private owners of the protection guaranteed by the fifth amendment. In our judgment there is no basis for the contention that the pipe-line amendment has any real or substantial relation to the monopoly alleged to result from the nature and methods of pipe-line transportation. (Rec., p. 127; Op., p. 39.)

DECREE IN EFFECT FINAL.

The decree of the Commerce Court granted a preliminary injunction, but the decision in effect determines the controversy by declaring the act of Congress unconstitutional and void as against these appellees. The cases below were argued upon the understanding that the decision, if in favor of the appellees, would in effect be a final decree, while if in favor of the contentions by the Commission it would leave no other question to be determined in the cases, and the petitions would have to be dismissed. Expressing this view, the Commerce Court concludes its opinion by saying:

> Without reference to other considerations which might justify preliminary injunctions in these cases, we have purposely placed our decision upon grounds which in effect determine the controversy, and we have done so to avoid occasion for protracted trials and to aid an early review by the court of last resort. (Rec., p. 137; Op., p. 49.)

In thus disposing of the cases, the Commerce Court acted in accordance with the suggestion of this court as to a proper disposition of a case upon a preliminary motion which involves a determination on the merits. This court, in remanding a case upon an appeal from an interlocutory order so that there might be opportunity to dispose of it on the merits, speaking through the Chief Justice, said:

> Of course, in saying this, we must not be understood as deciding or in any way implying that the duty would not exist to examine the merits of a preliminary order of the general character of the one before us in a case where it plainly in our judgment appeared that the granting of the preliminary order was in effect a decision by the court of the whole controversy on the merits or where it was demonstrable that grave detriment to the public interest would result from not considering and finally disposing of the controversy without remanding to enable the court below to do so. (*U. S.* v. *Balt. & Ohio R. R. Co.*, 225 U. S., 306, 326.)

These cases, therefore, are presented for final determination, upon the records herein. The errors assigned raise the following

QUESTIONS OF LAW.

I.

Is the business of the appellees affected with a public interest to an extent that it ceases to be *juris privati* only?

II.

Does the act to regulate commerce, as amended by the act of June 29, 1906, require that all persons and corporations thereafter transporting oil by pipe lines shall be common carriers under and subject to the act?

III.

If the act as amended does require that all corporations and persons thereafter engaged in the interstate transportation of oil by means of pipe lines shall be common carriers, is the act constitutional?

GENERAL STATEMENT OF FACTS.

Before discussing these questions of law, it is important to state the essential facts as they appear in the record. These facts are found in the allegations of the petitions, the report of the Interstate Competitions, the sworn answers of the Interstate Commerce Commission (used as affidavits on the hearing for preliminary injunction), the answers of the United States, and affidavits presented by petitioners upon the motion for preliminary injunction. There are also official records and public documents, of which this court takes judicial notice, to which reference is made, principally the record and decisions

of the court in the Standard Oil case (221 U. S., p. 1), and the debates in Congress upon the amendment of June 29, 1906, now requiring construction by this court.

Public interest.—The business of transporting petroleum is "clothed with a public interest." The production of crude oil, its grading and measurement, its transportation and distribution, are matters in which the public is deeply concerned. The extent of the public interest is shown by the amount of oil produced; the uses to which the oil and its products are put; the necessity of transporting the crude oil from the fields of production to refineries in distant parts of the country; the effect of the cost of transportation upon production and consumption; and the effect, upon all these interests, of a practice resulting in a monopoly of the crude oil.

Statistics.—The statistics here given are (1) those for the year 1905—which were before Congress when it passed the act in controversy—and (2) those for the year 1911, the last available figures. They are taken from public documents and records as follows: Report of the Commissioner of Corporations on the Transportation of Petroleum, May 2, 1906; Report of the Commissioner of Corporations on the Petroleum Industry, March 20, 1907; Statistical Abstract of the United States for 1907 and 1912, and statistics and other facts stated in the petitions and in the answers of the Interstate Commerce Commission and exhibits, in the pending cases.

Importance of the petroleum industry.—The production of crude petroleum throughout the world in 1905 was 215,000,000 barrels (42 gallons each), of which 134,717,580 barrels, or more than 60 per cent, was produced in the United States. The greater portion of that produced in the United States came from the fields east of the Rocky Mountains. The value of this product for the year 1905, fixed by the prices of the Standard Oil Company, was nearly $120,000,000.

The first statistical information regarding this product was for the year 1860, when the quantity produced in the United States was only 84,000 *gallons*. In 1905 the production had increased to 5,658,138,360 *gallons*.

In 1911 the production in the United States had increased in quantity to 220,449,391 *barrels*. The value of this product for 1911, at prices arbitrarily fixed by the Standard Oil Company, was $134,044,752. While the quantity had increased by nearly 86 million barrels the value had increased only 15 million dollars. With free competition this product should have brought the producers from 150 to 200 millions of dollars without materially increasing the cost to the consumer of the refined product.

Uses.—The refined oil is used for illumination over the civilized world. For power and heating purposes petroleum and its products are widely used, and their use is increasing. For lubricating oils and in the manufacture of a multitude of by-products it forms the bases of large industrial operations. In fact its use is so general, and so diversified, and so

essential to modern civilized life, that it must be put in the category of *necessities*.

Fields of production.—Crude oil is produced in various sections of the country described as "fields." The most important of these are the Appalachian field, covering parts of the States of New York, Pennsylvania, West Virginia, southeastern Ohio, Kentucky, and Tennessee; the Lima-Indiana and Illinois field, covering parts of northwestern Ohio, Indiana, and Illinois; the Mid-Continent field, covering parts of the States of Kansas and Oklahoma; the Gulf field, covering parts of the States of Louisiana and Texas; the Caddo field in Louisiana and Texas, and others in the States of California, Wyoming, Michigan, and Missouri. The important fields, east of the Rocky Mountains, together with the pipe lines and refineries, are shown upon the map attached to the answers of the Interstate Commerce Commission. (Rec. No. 481, p. 60.) In each of these fields there are thousands of wells from which crude oil is obtained, owned and operated by private citizens. The oil east of the Rocky Mountains is not suitable for domestic use, and therefore it must be refined.

Refineries.—The Standard Oil Company has refineries at numerous strategic points. Of its eighteen refining plants, seven, including the two largest, are on the Atlantic seaboard—five on New York Harbor (including Bayonne, N. J.), one at Philadelphia, another at Baltimore. The location of refiners on the seaboard is of great advantage in view of the

immense foreign trade and the heavy consumption of refined oil on the seaboard. Five smaller plants are in the vicinity of the Appalachian field, two in Ohio, near the Lima, Ind., field, and another large plant is at Whiting, Ind. From these refineries the Standard can conveniently reach the great markets of the Middle West and South. It has a refinery at Sugar Creek, Mo., and another at Neodesha, in southern Kansas.

Since the hearing of the testimony in the original Standard Oil case *supra*, the Standard located a large refinery at Baton Rouge, La., served by the pipe line operated by the Standard Oil Company of Louisiana (No. 483). This company was organized in April, 1909. There were in 1906 independent refineries, but the proportion of oil refined by the Standard Oil refineries was 84.2 per cent of the crude oil marketed; the balance, 14.8 per cent, was refined by the independent refineries.

Transportation of crude oil.—It will be observed from the location of the fields of production and the location of refineries that the transportation of crude oil is of very great importance to producers and consumers. The refineries are located in the eastern part of the country for convenience to the markets. The transportation of the crude oil varies in distance up to approximately 1,500 miles. The cost of transporting by pipe lines is estimated at one-fourth (possibly one-fifth) the cost of transportation by rail. This method of transportation has had an

important influence in determining the location and the building of refineries.

Pipe lines.— The use of pipe lines has been the most potent factor in enabling the Standard Oil Company to secure and maintain a dominant control of the petroleum industry. No producer, or refiner, or dealer in oil, can enter or compete in this industry without access to pipe lines. To be obliged to transport the crude oil any great distance by railroad is absolutely prohibitive.

Transportation by pipe lines began in 1865, but the main development has been since 1879.

Practically all of the crude oil produced in the United States is now transported to the refineries by means of pipe lines. A network of small pipes gathers the oil from the wells into tanks, and trunk lines, hundreds of miles in length, singly or in connection with other lines, convey it to the refineries.

The refined products of petroleum are transported mainly by rail and water in barrels or tanks. This is so because the refined article goes to a multitude of points for consumption and is delivered in comparatively small quantities. There has been a large increase in the transportation of refined oil by pipe lines from interior refineries to the seaboard for export; these lines do not deny that they are common carriers, and they are not involved in this controversy. We have here to consider only the transportation of crude oil from the fields of production to refineries.

This transportation is not an interplant service; it is a transportation business. It is specified as a separate and distinct object of incorporation in the several charters. It is a business primarily and essentially within the term "commerce" as used in the Federal Constitution. It is a business that Congress has the power to segregate from the business of buying and selling and refining. (*New Haven Railroad* v. *Int. Com. Com.*, 200 U. S., 361; *United States* v. *Delaware & Hudson Co.*, 213 U. S., 366, 415.)

Importance of transportation charges to the public.—In the Report of the Commissioner of Corporations on the Transportation of Petroleum, May 2, 1906, the importance of this subject is stated as follows:

> The petroleum industry affords a striking example of the importance of the transportation problem. The cost of transportation is an exceedingly large factor in the cost of oil to the consumer. Consequently, any difference in transportation costs, as between different producers and refiners of oil, has a powerful influence upon their respective positions in competition.
>
> The importance of transportation, with respect to petroleum, grows chiefly out of the fact that petroleum and most of its products are low-priced commodities. They are heavy in proportion to their value. Moreover, the value of the raw material, crude petroleum, is a large proportion of the total cost of the finished product, while the cost of refining is

> comparatively small, and a reasonable profit to the refiner is also a comparatively small factor per unit of product. Even an apparently slight difference in transportation rates may, therefore, enable one refiner to sell at a profit while his competitor is losing money (p. 33).
>
> And these differences in freight rates, whether legitimate or illegitimate, may easily make the difference between profit and loss to the refiner of petroleum (p. 34).

As already noted, the cost of the transportation of oil by pipe lines is at most one-fourth the cost of transportation by rail. The producer, the dealer, or the refiner must, therefore, be able to transport oil by pipe lines or leave the field to those who possess this facility. This means monopoly for the refineries controlling pipe lines; monopoly for the Standard Oil Company as conditions existed at the time of the legislation in controversy. The Commerce Court was compelled to say:

> True, the possession of a pipe line enables its owner to transport his oil to the refinery or other market at very small cost compared with any other means of conveyance. The practical result may be, and in most instances doubtless would be, that other producers find it to their interest to sell the output of their wells to the owner of the pipe line, and in this sense it may be said that they are obliged to sell to him.

Method of controlling the price and distribution of crude oil by pipe lines.—At the time of the legislation

under consideration the appellees, excepting the Uncle Sam Oil Company (No. 507), and the Standard Oil Company of Louisiana (No. 483), organized by the Standard in 1909, were owned and absolutely controlled by the Standard Oil Company. The Standard also owned and controlled many other lines. (See list Rec. 482, pp. 73, 74.) The method of doing the business was devised by that company; it was in effect on all lines, and the purpose was to control the oil industry of the United States (*Standard Oil Co. case, supra*). Aside from the "combination," which was held by this court to be unlawful under the Anti-Trust Act, the means, and we may say the principal means, by which this monopoly was secured, was through the ownership of the pipe lines *and the practice of buying the oil for the refineries, through the pipe lines, at the wells.* This *practice* is set forth in the sworn answers of the Interstate Commerce Commission, and in the agreement which each producer must sign before a connection will be made between his tank at the well and the receiving tanks of the pipe line. (Rec. No. 506, pp. 15, 16, 17.) By this contract the producer agrees that the oil *shall become the property of the pipe line* "as soon as the same is received into its custody," and, that "The oil received * * * shall be paid for * * * at *the market price paid by the*" pipe line. The prices *allowed to the producers*, referred to in said agreements, *are arbitrarily fixed and posted by the pipe line.* Upon these terms and conditions the pipe line *will take all the oil offered.* No common

carrier holds itself out, in a greater degree or to a greater extent, to take traffic for transportation, than these pipe lines do—upon the conditions named. Any producer desiring to market his oil to refineries (the only buyers) can do so by signing this monopoly contract. If he refuses to sign this contract he can not reach a refinery, because every other means of transportation is of no avail on account of the excessive cost. The cost by rail to an eastern refinery is usually the same as the monopoly price for the oil at the well. The producers must accept this arbitrary agreement and price for their product or allow the oil to run to waste upon the ground. "Take our price or take nothing" is the imperial edict of the monopoly and the hopeless alternative to the producers.

Through the possession of these pipe lines, therefore, and the contract method of transferring the title at the wells as a condition of transportation, the Standard Oil Company was able to *compel* the signing of the agreements by the well owners. No refiner or dealer could go into the field and buy the oil, as is done for instance by millers and dealers in the grain-producing-territory, for the cost of transportation by rail was too great to permit of such buying. The producer, therfore, must either allow his oil to go to waste or sell it at the price which the Standard Oil Company was willing to give. Taking the situation as it existed in 1906, when this legislation was enacted, it is absurd to say that these prices were fixed by any *subordinate organization*. The Standard

Oil Company dominated the situation. These producers were compelled, by the artificial conditions created by the Standard Oil Company, to deliver their oil at the arbitrary price fixed by that company. While the Standard Oil Company, through its pipe line companies, owned a few wells, the production from these wells was small and unimportant. They were simply used to give some semblance of reason to the theory that the pipe line companies were *producers* of oil. So long as they could hold these thousands of producers in the oil fields in subjection, and compel them to deliver their oil at the Standard's prices, the Standard Oil Company had no reason or incentive to bore, and experiment with oil wells. It was safer and cheaper to enslave the producers.

The Standard Oil Company had, by these methods, obtained the title to and control of 85 per cent of the oil produced. It held the field by virtue of the fact that it controlled existing pipe lines and, by its contracts, fixed the price of the entire output of crude oil. To organize any effective competition was practically impossible; in fact no one was interested in doing this except the producers, and they are men of very small means.

Independent refiners.—The ownership of the pipe lines and the monopoly of the crude oil enabled the Standard Oil Company to determine practically the quantity that it would allow the existing independent refineries to consume, and to fix the price of crude

oil to them. This condition effectually prevented the building of competing refineries.

Monopoly.—Considering the condition existing at the time this legislation was enacted, the following results were inevitable, namely, (1) the Standard Oil Company controlled and arbitrarily fixed the price of crude oil at the wells; (2) no independent refinery in the East could secure crude oil except from the Standard Oil Company; and (3) the quantity accorded to the independent refineries, and the price they must pay for it, were fixed arbitrarily by the Standard Oil Company. With these three "grips" the Standard Oil Company held a complete monopoly of the oil industry by *artificially created* conditions. Considering this situation, created by this combination and conspiracy of the Standard Oil Company, the language of the Commerce Court is strangely at variance with the language of this court. In the opinion of the Commerce Court (p. 36), that court said:

> But how does the possession of a private pipe line by one of many oil producers or dealers take from the others any privilege or opportunity which is rightfully theirs or which they are justly entitled to share with the more fortunate owner? Of what right can they be said to be deprived, or in what respect are they subjected to any injury or disability which is illegal?

And on pages 38, 39:

> It is only repeating to say that the private use by petitioners of the pipe lines in ques-

> tion has no relation to monopoly, and in no correct sense of the word tends to monopoly, since such use does not exclude others from any privilege which is rightfully theirs and involves only that exclusion which is inseparable from the possession and enjoyment of private property.
>
> It may be that the greater number of oil producers *are virtually compelled* to sell their output to the owners of private pipe lines, because they are unable or unwilling to build pipe lines of their own, or because there are no common-carrier pipe lines to which they have access. * * *

This court, in the Standard Oil Company case, *supra*, said (pp. 76–77):

> The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

> The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other, and if the inferences which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

Public markets.—Referring again to the contract signed by the producers by which they dispose of their oil to the Standard pipe lines, it will be observed that the pipe line companies *measure and grade the oil in their own way and by their own agents.* They take all the oil offered. Considering in this connection the fact that practically all of the oil produced is measured and gauged by, and sold to, the pipe lines, it follows that these are the public markets *and the only public markets* for this enormous domestic product. Through these practices, carried on by the Standard Oil Company and these pipe lines, markets were established and maintained in every field of production and presided over by this monopoly.

This court, in *W. W. Cargill Co.* v. *Minnesota ex rel. Railroad & W. Com.* (180 U. S., 452, 462–465), speaking through Mr. Justice Harlan, said:

> The defendant company during the period mentioned never received into, or shipped from, or handled or deposited or in any way stored in the warehouse any grain in which any other person or persons had any property, title, right, or interest; * * *. But the warehouse was used, occupied, and operated by the defendant solely for the purpose of receiving, handling, and shipping its own grain in its private capacity as grain owner and merchant.
>
> * * * It was conceded on the argument, and is fairly to be inferred from the findings and stipulation of facts, that the grain is purchased, weighed, graded, and delivered at the warehouse, and that defendant, with its own scales and appliances, weighs and grades the grain. Under these circumstances the warehouse is a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as market-master, weighmaster, inspector, and grader of the grain. *Surely such a business is of a public character, and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the State.*

Right of way.—As already noted, pipe lines for the transportation of oil are of recent origin. When the construction of these lines began, no State in the Union had any statute providing for the organization

of such lines or for the exercise of the power of eminent domain by them. The statutes upon these subjects which now exist in many States are of comparatively recent origin. In the beginning the pipe lines were compelled to acquire right of way by private contract.

The exercise of the power of eminent domain is not essential to *create* a "public interest" in or right to regulate a business of transportation. The possession of this power is not essential to make a corporation *quasi public* in character. Express companies, sleeping car companies, electric light and power companies, telegraph companies, and others are *quasi public* corporations, but do not possess the power of eminent domain.

Franchises.—To construct pipe lines it was and is essential that public franchises be accorded them. These pipe lines cross hundreds of public highways and streets. A contract for such a right "from the abutting owners" can not deprive the State or municipality of its superior sovereign right over the highway or street. The State or municipality can compel the changing or the removal of these pipes if they are regarded dangerous to the public. The construction and maintenance of these pipe lines upon these highways and streets is by public consent, and such consent is absolutely essential to such construction. These lines run many hundred miles through a thickly settled portion of the country and necessarily cross or run upon hundreds of roads and streets. These privileges are not granted to a purely

private business. This is not therefore a private business that can be carried on independently of governmental franchises.

These pipe lines cross and in some instances run upon rights of way of railroad companies whose rights of way have been secured under public authority. The Prairie Oil & Gas Company runs 300 miles upon the right of way of the Atchison, Topeka & Santa Fe Railway. Some of the other appellees enjoy similar privileges. These privileges, whatever the contract may be with the railroad company, are subject to the same obligations and burdens, as far as the public is concerned, that the right of way of the railroad company is subject to. These pipe lines are no less public because they operate upon these rights of way by contract with the railroad company than are telegraph, express, or sleeping car companies. Whatever rights inhere in the public in one case exist as to the other.

Some of these pipe lines run upon parts of the public domain. The privileges were granted by the United States Government, acting through the Interior Department, under regulations provided by law. By statute Congress provided for the granting of rights of way to pipe lines through Indian and public lands by the Secretary of the Interior. (33 Stat. L., 65.)

A "franchise" is defined to be "A special privilege emanating from the Government and vested in an individual or a body politic and corporate, *which is*

not possessed by citizens generally." Using this general definition, it is clear that these rights over public highways, streets, railway rights of way, and the public domain are franchises within the meaning of the law and were and are granted to these pipe lines because of the public interest in the transportation which these lines are organized to carry on.

Eminent domain.—In nearly all the States interested in the production and transportation of oil statutes have been passed conferring upon pipe-line companies the power of eminent domain. Any one of these companies may now exercise that power in its State. This power is only granted to *quasi-public* corporations; not for the purpose of making the corporations *quasi public*, but in recognition of the fact that they are performing a service in which the public is interested and to enable them, by reason of the public interest, to carry on successfully their business. This extraordinary power is called into action only in cases where the companies can not agree with the owners of property needed in the construction of transportation lines. In most cases there is agreement as there was in these cases. The charter of each of these pipe lines, in naming the purposes for which the corporation is organized, states, in a definite form, *the transportation of oil.* The public is interested in this transportation business, and therefore has aided these companies by granting to them the usual privileges accorded to transportation companies.

PARTICULAR FACTS REGARDING EACH OF THE APPELLEES.

No. 481.

The Ohio Oil Company is organized under the laws of the State of Ohio, with a capital stock of $15,000,000, of which $14,999,850 was owned by the Standard Oil Company; it owns and operates, under lease and otherwise, a trunk line from the Lima-Indiana field in Indiana, to Centerbridge, in the State of Pennsylvania; it acquired its right of way by contract over lands traversed, and crosses public highways by municipal grants or permission; it purchases crude oil and transports the same through its pipe lines, delivering the oil to the Standard Oil Company of New Jersey at Centerbridge. The price of the crude oil at the wells is arbitrarily fixed by the pipe-line company; its purchases, sales, and deliveries to the Standard Oil Company are conducted substantially in the same manner as are the transactions of the Prairie Oil & Gas Company and other Standard Oil pipe lines. Its charter expressly authorizes it to *transport* oil.

No. 482.

The Standard Oil Company was incorporated under the laws of the State of New Jersey August 5, 1882. The facts concerning the capitalization and holdings of this company, in 1906 and subsequently, were judicially determined in *Standard Oil Company* v. *United States* (221 U. S., 1). The bill in that case was filed November 15, 1906, and shows the conditions in the oil industry existing at that time. The

Standard Oil Company was originally a holding company and acquired the majority, and in many cases all, of the stocks of "various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various States and Territories of the United States and the District of Columbia, and with foreign nations"; in January, 1899, the charter was amended so that the business and objects of incorporation included, among other things, "transporting goods and merchandise by land or water in any manner." This company succeeded to all of the holdings of the Standard Oil Company of Ohio, which company was, by the Supreme Court of Ohio, on March 2, 1892, adjudged to be an unlawful monopoly in restraint of trade. Among the forty corporations whose stocks, or a majority thereof, were transferred to the Standard Oil Company was the total stock of the National Transit Company; this stock was held by the Standard Oil Company at the time of the entry of the decree in the Standard Oil Company case, *supra*. (Rec. No. 482, p. 73.)

The petition herein states, and the decree in the Standard Oil case shows, that the Standard Oil Company also had transferred to it certain refineries, or the stocks thereof, formerly owned by the Standard Oil Company of Ohio, located at Bayonne, N. J., Baltimore, Md., and Jersey City, N. J. The National Transit Company was organized under a special charter granted by the State of Pennsylvania "to take over such of the pipe lines belonging to or held

for the Standard Oil Company of Ohio or its stockholders as might be transferred to it; that under the terms of its charter the National Transit Company was then, and has always been, a common carrier within the State of Pennsylvania." (Rec. No. 482, p. 3.)

The Transit Company acquired, in 1882, and operated until May 1, 1894, two main trunk pipe lines for the transportation of crude oil to the Standard Oil Company's refineries aforesaid; one line extended from the Appalachian field through the State of Pennsylvania to Philadelphia, with a branch line extending from the main line to Baltimore, in the State of Maryland, and another branch line extending from its said main line to Bayonne, in the State of New Jersey. The second trunk line extended from the Appalachian field through the State of New York and the State of New Jersey to Bayonne. In 1890 the State of New York passed an act providing for the incorporation of pipe-line companies, making them common carriers. About May 1, 1894, the Standard Oil Company organized the New York Transit Company under the laws of the State of New York, and caused the said trunk line, extending through New York to Bayonne, New Jersey, to be conveyed by its National Transit Company to the newly organized New York Transit Company. The entire stock of the New York Transit Company was issued to and held by the Standard Oil Company. (Rec. No. 482, p. 73.) After May 1, 1894, the Na-

tional Transit Company and the New York Transit Company, both common carriers by virtue of their charters and the laws of the States under which they were organized, owned, as aforesaid, and operated the two trunk lines and branches for the purpose of supplying the refineries of the Standard Oil Company at the points named with crude oil.

Pending the legislation by Congress in controversy, requiring pipe lines to be common carriers and to file their tariffs with the Interstate Commerce Commission, "about November 3, 1905," the petition herein alleges, "the boards of directors of the National Transit Company and the New York Transit Company, respectively, passed resolutions authorizing the sale to petitioner (Standard Oil Company) of all their said pipe line properties in New Jersey and Maryland, and that thereafter, on or about July 17, 1906, deeds conveying said properties were duly executed and delivered to petitioner, with the exception of the deeds for certain small pieces of land which were overlooked at the time of the original transfer, and were executed and delivered to the petitioner in 1908 on the discovery of the oversight; and that the operation of said properties was taken over by your petitioner in August, 1906." (Petition, Rec., No. 482, p. 4, paragraph 8.) At the time this transfer was made the States of New Jersey and Maryland did not require pipe line companies to be common carriers. The eastern ends or parts of the trunk lines above described, conveyed to the Standard Oil Company, extend (1) from Unionville, on or near

the boundary line between New York and New Jersey to Bayonne, N. J., and Brooklyn, N. Y.; (2) from Centerbridge, at or near the boundary line between the States of Pennsylvania and New Jersey, to Bayonne and Baywater; and (3) from Fawn Grove, at or near the boundary line between Pennsylvania and Maryland to Baltimore; all these lines connecting with refineries and storage tanks of the Standard Oil Company. (See map.)

There are no oil wells producing crude oil at either Unionville, Centerbridge, or Fawn Grove, nor are there any refineries or consumers of crude oil at said points or either of them. Although the National Transit Company and the New York Transit Company were common carriers by virtue of their organization by the laws of the States under which they were organized, yet by virtue of the control exercised by the Standard Oil Company over these companies no oil was shipped through them except for its refineries at Bayonne, Philadelphia, and Baltimore or for export by the Standard Oil Company. The conveyance of these ends of the trunk lines to the Standard Oil Company was for the purpose of placing the title to said pieces in a corporation not required to be a common carrier by the law of the State in which it was incorporated, and to avoid, if possible, the effect of the act of Congress in controversy requiring carriers of oil by pipe lines to file tariffs with the Interstate Commerce Commission, and also to limit the transportation of oil through the trunk lines of the National Transit Company and the New

York Transit Company to oil carried for the Standard Oil Company. By controlling the eastern ends of these trunk lines no refinery situated upon the seaboard could take advantage of the requirement that the National Transit Company and the New York Transit Company should be common carriers, and secure crude oil from the Appalachian field, as the Standard Oil Company claimed to be a private carrier carrying only its own product and refused to receive oil at Unionville, Centerbridge, or Fawn Grove for other refiners. There was in fact no change of *actual* ownership of these pieces of pipe lines. The two transit companies were wholly owned and controlled by the Standard Oil Company. The Standard owned and operated these pipe lines just as completely before the transfer to it as it did afterwards. Practically there was no difference in the ownership, and there was not, and could not be, any object in making the transfer other than an attempt to circumvent the pending legislation by Congress.

The Standard Oil Company receives crude oil transported to and for it from the western fields through the system of pipe lines shown upon the map referred to. It refuses to receive crude oil not transferred to it under the terms and conditions above set forth. By means of its pipe lines and those controlled by it, particularly as set forth in this appellant's answer (Rec. No. 482, p. 61), it held, in 1906, a practical monopoly of the oil production and trade of the United States.

No. 483.

The Standard Oil Company of Louisiana was organized under the laws of Louisiana in April, 1909, and commenced business after the commencement of the suit to dissolve the Standard Oil Company; its charter provides that it may *transport* oil.

It owns and operates a refinery at Baton Rouge, in the State of Louisiana, and a trunk pipe line extending from the northern State line to Baton Rouge. It has gathering lines in the Caddo field; it purchases about one-third of its oil from the Mid-Continent field, which is delivered to it by the Prairie Oil & Gas Company, the transportation being a through transportation from the Mid-Continent field to its refinery; the last-named company takes the title to the oil at the wells and transfers it to the Standard at the point of connection. No oil is transported through either line that is not purchased for the refinery at Baton Rouge. Its business is conducted upon precisely the same lines and bases as the other Standard Oil companies.

No. 506.

The Prairie Oil & Gas Company is organized under the laws of the State of Kansas, and it is authorized to explore for, mine, produce, purchase, store, sell, and *transport* petroleum oil.

By a decree of the Supreme Court of the State of Kansas (Exhibit B to answer I. C. C. Rec. 506, pp. 22 to 25) it is enjoined from manufacturing, storing, selling, or marketing refined petroleum oil, and

from "*making or carrying out any arrangements, contracts, agreements, understandings, trusts, or combinations, with a view or which tend to advance rates or control the price or the cost to the producer or to the consumer or to prevent the full and free competition in the importation, transportation, manufacture, or sale of crude petroleum.*" Its present authorized capital is $20,000,000, of which the National Transit Company held $17,797,400 (increased from $10,000,000, Dec. 11, 1907); the Standard Oil Company owned and held the stock of the Transit Company at the time of the dissolution of the Standard Oil Company. (See copy of the supplemental decree dissolving the Standard Oil Company of New Jersey, Exhibit A to I. C. C. answer Rec. 482, pp. 71 to 77.) This stock was distributed, under the decree, to the stockholders of the Standard Oil Company.

The Prairie Oil & Gas Company owns and operates pipe lines consisting (*a*) of gathering lines in the Mid-Continent field, in the States of Kansas and Oklahoma, (*b*) a trunk line from the Mid-Continent field to Whiting, in the State of Indiana, where it connects with the Indiana pipe line, and (*c*) a trunk line in the State of Arkansas, connecting the Oklahoma pipe line with the pipe line of the Standard Oil Company of Louisiana. (All particularly shown upon the map, Exhibit C to this appellant's answer.) It has about 860 miles of trunk line, its total mileage approximating 3,000 miles (single pipe). The right of way for its trunk lines was secured by

contract over all property which it traverses; but these modifying facts are stated in the answer:

(1) About 300 miles of the trunk line to Whiting is on the right of way of the Atchison, Topeka & Santa Fe Railway; this right of way was acquired by contract with the railroad company and, it is claimed, with the abutting owners of the fee.

(2) Its right of way through the Indian lands in Oklahoma was secured by public grant upon application to the Interior Department, in accordance with an act of Congress approved March 11, 1904 (33 Stat. L., 65), and subject to the regulations of the department.

(3) By public grants or permission from State and municipal authorities, it crosses many public highways and streets.

This company stored and transported through its pipe lines in 1910 about 80 per cent of the total production of crude oil in the Mid-Continent field; it offers to connect its line and take the oil from any and all producers in that field upon the condition (1) that the title to the oil vest in the pipe-line company immediately upon its being gauged and delivered into its gathering pipes, and (2) that the producer accept the arbitrary price fixed and posted at the wells by the pipe-line company. It measures and gauges the oil at the wells. Through its pipe lines and connecting pipe lines oil is purchased for and delivered to the refineries owned, operated, or controlled by the Standard Oil Company of New Jersey. The price paid by the refineries for the crude oil so delivered

is fixed by the refinery, and includes the cost of transportation.

The fields of production, refineries, and pipe lines are particularly shown upon the map referred to. This company has, in its storage tanks and pipe lines, accumulated oil amounting to 40,000,000 barrels, and has standing agreements for future delivery to the refineries named amounting to 100,000 barrels per day. It produces from its own wells about 11,557 barrels per day, and has outstanding obligations to purchase from well owners about 70,000 barrels per day.

No. 507.

The Uncle Sam Oil Company was incorporated under the laws of the Territory of Arizona for the purpose of producing, *transporting*, refining, and marketing oil. It is not one of the Standard Oil group. It operates oil wells in the Osage Indian Reservation in the State of Oklahoma, and a refinery at Cherryvale, in the State of Kansas. It owns and operates a pipe line, with storage tanks, from its wells in the reservation in the State of Oklahoma to its refineries in Cherryvale, Kansas. Through the agency of a selling corporation, the capital stock of which it owns, it ships its refined product in tank cars, owned by it, from its refinery at Cherryvale to stations owned by it in the State of Missouri. Its right of way for its pipe line was secured by contract over the lands traversed by it, and by permission of the Interior Department

over Indian lands; it crosses public highways by grant or permission of the public. Its charter permits it to *transport* oil as a common carrier. This company is constructing new lines to other points which will soon be open for traffic.

No. 508.

The Tide-Water Pipe Company, Limited, is a partnership created under the laws of the State of Pennsylvania. It has a capital stock of $625,000, for which certificates are issued only to members. It owns and operates a trunk pipe line from the Appalachian field on the western line of the State of Pennsylvania to Bayonne, in the State of New Jersey. The company also ownes and operates branches from the Allegheny and New York field, and branches through McKean County, Pa., and also a line extending from Stoy, Crawford County, Ill., through the States of Illinois, Indiana, Ohio, and Pennsylvania. This pipe line crosses, at the Pennsylvania State line, the Buckeye pipe line. It purchases oil in the Appalachian field, and receives oil from connecting lines from other fields, which it transports to the Tide-Water Oil Company refinery at Bayonne, New Jersey. This refining company has an outstanding capital of $24,000,000.

This company refuses to take any oil into its pipes for transportation except upon condition that the title is transferred to the company at the company's posted prices. The Standard Oil Company of New Jersey has an interest of 31 per cent in said partnership and

is represented by H. C. Folger, jr., and holds the same proportion of the stock of the refining company.

CONCLUSIONS OF FACT.

The general and particular facts above set forth show:

(1) That all of the appellee companies are organized and by their charters are authorized, to construct and operate pipe lines and transport oil.

(2) That each of the appellee companies is engaged in the transportation of oil "among the several States."

(3) That the public, through the United States, State, and municipal governments, recognizing the public interest in this business, has granted valuable franchises to each of these companies.

(4) That said appellee companies have established and maintain public markets for the sale of crude oil.

(5) That the oil produced in the United States and transported by these companies is of the value of $150,000,000 and the public is interested in this transportation.

(6) That this transportation, in connection with the methods by which it is carried on, vitally affects thousands of producers of crude oil in the United States, and arbitrarily fixes the price of crude oil.

(7) That this transportation and these practices affect and restrict independent refineries in the United States, and enable the favored refiners to arbitrarily fix the price of refined oil.

(8) That this transportation in connection with these practices affects millions of consumers in the

United States and tends to, and does, create a monopoly in petroleum.

Therefore, this business *is affected with a public interest;* it *is interstate commerce;* and we shall now contend that Congress has complete Constitutional power to regulate it in the manner provided in the act of 1906.

QUESTIONS OF LAW.

I.

Is the business of the appellees affected with a public interest to an extent that the business ceases to be juris privati only?

It is not necessary that a person carrying on a business "hold himself out" to serve the public in order to charge the business with a public interest. The business in its beginning may be purely private, but so develop, through design or by evolution, that the public must avail itself of the advantages furnished. It may become a virtual monopoly. In either case it ceases to be *juris privati* only and becomes "affected with a public interest," subject to regulation.

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain.
>
> "A body politic," as aptly defined in the preamble of the constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be gov-

erned by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe* v. *R. R. Co.*, 27 Vt., 143, but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to injure another.

* * * * *

Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.

* * * * *

Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest it ceases to be *juris privati* only." This was said by *Lord Chief Justice* Hale more than two hundred years ago in his treatise *De Portibus Maris*, 1

> Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest *when used in a manner to make it of public consequence and affect the community at large.* When, therefore, one devotes his property to a use in which the public has an interest, he, *in effect*, grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use,* but so long as he maintains the use he must submit to the control.

Lord Chief Justice Hale, in his treatise *De Portibus Maris*, distinguishing between a public and a private wharf, the former of which can be regulated, says:

> If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the Queen, * * * *or because there is no other wharf in that port, as it may fall out where a port is newly erected;* * * * the wharf and crane and other conveniencies are effected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest.

Lord Ellenborough, in *Allnutt* v. *Inglis*, 12 East, 527, 539 (decided in 1810), referring to the language of Lord Hale, said:

> *It is enough* that there exists in the place and for the commodity in question a *virtual monopoly* of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to (that from *De Portibus Maris* already quoted), which includes the good sense as well as the law of the subject.

And in the same case Le Blanc, *J.*, said (p. 541):

> Then *admitting these warehouses to be private property*, and that the company might discontinue this application of them, or that they might have made what terms they pleased *in the first instance, yet having, as they now have, this monopoly*, the question is whether the warehouses be not private property clothed with a public right, and if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of Parliament to the company's warehouses, it is not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? * * * But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris priviti* only, and in case of its dedication to such a purpose as this, the owners can not take arbitrary and excessive duties, but the duties must be reasonable.

The foregoing statements of the law are set forth in Munn *v.* People of Illinois (94 U. S., 113, 154), as

"the principles upon which this power of regulation rests."

In *Munn* v. *Illinois*, *supra*, the constitution of Illinois, adopted in 1870, provided, in article 13, section 1, that "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are *declared to be public warehouses*."

An act of the Legislature of Illinois, approved April 25, 1871–2 (Pub. Laws of Ill., p. 762), divided public warehouses into three classes, prescribed the taking of a license, the giving of a bond, and fixed the maximum charge for warehouses belonging to class A, for storing and handling grain, including the cost of receiving and delivering, and imposed a fine on conviction for not taking a license, or not giving the bond.

Munn and Scott were indicted, convicted and fined for not taking out the license, and not giving the bond, and for charging rates for storing and handling grain higher than those established by the act. They were the managers and lessees of an elevator constructed and operated "by private individuals, who have embarked their capital and devoted their industry to such business as *a private pursuit*"; the elevators were erected at the points where transportation by water on the lakes meets the rail transportation for the East; these elevators elevated the grain from the ships into the elevator, mixed and graded the grain and delivered it into the cars.

This court, speaking through Mr. Chief Justice Waite, said:

This mode of conducting the business was inaugurated more than twenty years ago and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has therefore been by private individuals who have embarked their capital and devoted their industry to such business as a private pursuit.

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business and owned by about thirty persons, nine business firms controlled them and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" *may* be a "*virtual*" *monopoly*.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney coachman pursues a public employment and exercises "a sort of public of-

> fice," these plaintiffs in error do not. * * * Certainly if any business can be clothed "with a public interest and cease to be *juris privati* only" this has been. It may not be made so by the operation of the constitution of Illinois or this statute, *but it is by the facts.*

Referring to the provisions of the constitution of Illinois and the legislation thereunder, the court further said:

> This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.
>
> Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that

it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.

* * * * *

We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

* * * * *

It matters not in this case that these plaintiffs in error had built their warehouses and established their business *before the regulations complained of were adopted*. What they did was, from the beginning, subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good.

* * * * *

It was very properly said in the case of the *State Tax on R. Gross Receipts*, 15 Wall., 293 (82 U. S. XXI, 167), that "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but

> they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly until Congress acts in reference to their interstate relations the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.

The doctrine laid down in *Munn* v. *Illinois* has been followed by this court and the supreme courts of many States of the Union. It came up for reexamination and review by this court in *Budd* v. *State of New York*, 143 U. S., 517, 552. In the opinion in the Budd case, many extracts from the opinion in the Munn case are set forth, many State cases are reviewed which had followed the Munn case, and the doctrine in the Munn case is reaffirmed.

In *Budd* v. *State of New York*, *supra*, an act of the State of New York was under consideration. The act provided that—

> SECTION 1. The maximum charge for elevating, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State shall not exceed the following rates, namely:

Then follows certain rates, concluding as follows:

> and canal boats, shall only be required to pay the actual cost of trimming or shoveling

to the leg of the elevator when unloading, and trimming cargo when loading.

The act provided fines and penalties for violation of the law.

Budd was indicted for a violation of the act, he being the manager of the Wells Elevator in Buffalo, which was an elevator and warehouse for receiving and discharging grain in the city of Buffalo.

The defense was that the services rendered by Budd, for which the statute assumed to fix the price, were not public in their nature; that neither the persons rendering them nor the elevator in question had received any privilege from the legislature, and that such elevator was not a public warehouse and received no license.

This court, speaking through Mr. Justice Blatchford, said:

> We must regard the principle maintained in *Munn* v. *Illinois* as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing, and discharging the grain, as well as in respect to the charge for trimming and shoveling to the leg of the elevator when loading, and trimming the cargo when loaded.
>
> * * * * *
>
> We are of opinion that the act of the legislature of New York is not contrary to the 14th amendment to the Constitution of the United States and does not deprive the citizen of his property without due process of law; that the act, in fixing the maximum charges which it

specifies, is not unconstitutional, nor is it so in limiting the charge for shoveling to the actual cost thereof; and that it is a proper exercise of the police power of the State.

On the testimony in the cases before us, the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community *analogous to that of common carriers.*

* * * * *

In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible.

* * * * *

The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engaged in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

In *Sinking Fund Cases*, 99 U. S., 700, 747, Mr. Justice Bradley, who was one of the justices who concurred in the opinion of the court in *Munn* v. *Illinois*, speaking of that case (dissenting opinion), said:

The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a

> common charge or burden upon the citizens; in other words, *when it becomes a practical monopoly, to which the citizen is compelled to resort* and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power.

In *Spring Valley Water Works* v. *Schottler*, 110 U. S., 347, 354, a case where a *private* water company was required to furnish water at rates fixed by a statute, this court, speaking through Mr. Chief Justice Waite, said:

> That it is within the power of the Government to regulate the prices at which water shall be sold by one who enjoys a *virtual monopoly* of the sale we do not doubt. That question is settled by what was decided on full consideration in *Munn* v. *Illinois*, 94 U. S., 113. As we said in that case, such regulations *do not deprive a person of his property without due process of law.*

In *Dow* v. *Beidelman*, 125 U. S., 680, 686, this court, speaking through Mr. Justice Gray, said:

> In *Munn* v. *Illinois*, * * * after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," the Chief Justice said: "To limit the rate of

> charges for services rendered in public employment, or for the use of property in which the public has an interest, only changes a regulation which existed before. It establishes no new principle in the law, but only gave a new effect to an old one."

The Supreme Court of Ohio said:

> Where the owner of property devotes it to a use in which the public have an interest, he *in effect* grants to the public an interest in such use, and must, *to the extent of that interest*, submit to be controlled by the public, for the common good, so long as he maintains the use.
>
> (*State* v. *Columbus G-L. & C. Co.*, 34 Ohio State, 572–582.)

The legislature may fix maximum charges for services in which the public has an interest, even when such persons have derived no special privileges from the State. (*Ruggles* v. *People*, 91 Illinois, 256–262.)

In Alabama, a statute declaring it unlawful within certain counties, to transport or move, after sunset and before sunrise of the succeeding day, any cotton in the seed, but permitting the owner or purchaser to remove it from the field to a place of storage, was not unconstitutional. It was claimed that the statute was a despotic interference with the rights of private property, and its practical effect a deprivation of ownership without due process of law. The court said that the statute sought only to regulate and control the transportation of cotton in one particular condition of it, and was a mere police regulation to

which there was no constitutional objection; "that the object of the statute was to regulate traffic in the staple agricultural product of the State, so as to *prevent a prevalent evil*, which, in the opinion of the law-making power, might do much to demoralize agricultural labor and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory." (*Davis* v. *State*, 68 Ala., 58.)

Nothing is better established than the power of the legislature to make what are called "police regulations," declaring in what manner property shall be used and enjoyed and business carried on, with a view to the good order and benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. (*Sawyer* v. *Davis*, 136 Mass., 239.)

In a telephone case it was held that when corporations or persons assumed and undertook to supply a public demand made necessary by the requirements of the commerce of the country, such as a public telephone, they were subject to regulation. (*Webster Telephone Case*, 17 Neb., 126. (See also *Hockett* v. *State*, 105 Ind., 250, 258.) *Chesapeake & P. Teleph. Co.* v. *B. & O. Teleg. Co.*, 66 Md., 399, 414.)

A telephone company "not possessed of any special privileges under the statutes of the state" and operating under

> no law giving it a monopoly of the business in the territory covered by its wires, yet it must

be apparent to all that the mere fact of this territory being covered by the "plant" of the respondent, from the very nature and character of its business, gives it a monopoly of the business which it transacts. No two companies will try to cover the same territory. The demands of the commerce of the present day make the telephone a necessity.

* * * * *

"That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, can not be questioned. * * * It has assumed the responsibilities of a common carrier of news. It has and must be held to have taken its place by the side of the telegraph as such common carrier. * * * It is affected with a public interest, it must supply all alike, who are alike situated, and not discriminate in favor of or against any. *State* v. *Nebraska Telephone Co.*, 22 N. W. Rep., 237.

In a controversy between proprietors of tobacco warehouses in the city of Louisville and large dealers in tobacco, it was held that—

Such warehouses have been always regulated by law for the benefit of the producer, as well as those who are the proprietors of these warehouses, and the latter have assumed an obligation to the public that exists so long as they continue public warehousemen. They have assumed a *quasi* public character under the protection of the law, and will not

be allowed to exercise all the privileges that have heretofore belonged to warehousemen, and evade all the duties and responsibilities of their position by the passage of a resolution disclaiming that they are operating their houses in the capacity of warehousemen, but as commission merchants.

They pursue the same business, without any change as to the manner of selling or of conducting their warehouses, claiming only the exercise of a private right, and an entire exemption from the discharge of a public duty.

* * * * *

While the warehouse is the private property of the owner it has been devoted to a public use and is controlled and regulated in the conduct of its business for the protection of this great interest. (*Nash* v. *Page*, 80 Ky., 539; 44 Am. Rep., 490.)

In a case involving the right of the Associated Press to discriminate between newspapers, the Supreme Court of Illinois held:

Where one is the owner of property which is devoted to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, as long as such use is maintained. The manner in which it is devoted to a use in which the public has an interest may be very diverse, and the public interest in such use may be of a widely variant character; but where the use is one in which the public is interested,

> or has an interest, public control is necessary for the common good.
>
> * * * * *
>
> Appellee would be powerful in the creation of a monopoly in its favor, and could dictate the character of news it would furnish, and could prejudice the interests of the public. Such a power was never contemplated in its creation and is hostile to public interests. * * * Its tendency, therefore, is to create a monopoly in its own favor, and to prevent its members from procuring news from others engaged in the same character of work, and such provision is illegal and void. (*Inter-Ocean Publishing Co.* v. *Associated Press*, 184 Ill. 438; 48 L. R. A. 568.)

The Board of Trade of the City of Chicago has for its objects the maintenance of a commercial exchange; securing uniformity in the customs and usages of merchants; acquiring and disseminating valuable commercial and economical information, etc. The growth of the association made it of great local and national importance as a trade center. The Western Union Telegraph Co. occupied an office in the exchange. The board by a rule undertook to control the market reports sent out with a view to limiting the information to correspondents approved by the board. A correspondent of the telegraph company, being threatened with having his service cut off, filed a bill for an injunction.

The contention of the board of trade was that it is a strictly private corporation; that the market news and statistics collected and compiled are private

property of the association which it had the legal right to control, etc. The Supreme Court of Illinois held that:

> The board of trade is a private corporation, and it was incorporated for the purpose of affording facilities to its members in doing business with each other. In their transactions upon the floors of the exchange they deal as principals with each other, but in respect to the outside world they are brokers and commission merchants for the producers, consumers, shippers and merchants whom they represent. * * * it has become of vast commercial influence and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessaries of life throughout the country and the world.
>
> * * * * *
>
> In this way the business of the country in buying and selling agricultural products has been brought under the control of the market values for such products as fixed and determined on the board of trade; and the business of dealing in such products has been brought to conform to the method of receiving instantaneous and continuous market reports inaugurated and for years persisted in by the board of trade and the telegraph companies.
>
> This market news is a species of property; * * * it may be it would have been strictly private property held in trust by the board for the use and benefit of such members and wholly free from any public interest therein.

But the board did not so exercise its franchises and so conduct its business, but admitted the telegraph companies to the floor of its exchange and permitted and encouraged them from day to day and year after year to gather these statistics of the dealings on the board and telegraph them immediately as they were made, throughout the land, * * * and all persons dealing in such products could not without the knowledge and benefit of these immediate quotations intelligently and safely so deal.

The facts that the board of trade is a private corporation and that the dealings between its members are private business, such as is transacted between dry goods, grocery and commission merchants, and that the statistics of these dealings collected as we have stated are private property, are not conclusive that such statistics are not charged with a public interest and that there is no duty due the public in respect thereto.

* * * * *

Assuming that these market quotations and reports are property, and the private property of the board of trade, yet if they have been so used by the board and by the telegraph companies with the knowledge and consent of the board as to become affected with a public interest, then they are subject to such public regulation by the Legislature and the courts as is necessary to prevent injury to such public interest.

* * * * *

We think the case made by the bill of complaint and the proofs brings it within the

rule announced by the Supreme Court of the United States in *Munn* v. *Illinois*, *supra*.

(*New York & Chicago Grain & Stock Exchange* v. *Chicago Board of Trade*, 127 Ill., 153; 2 L. R. A., 411.)

Franchises.—As already stated, these pipe lines are possessed of certain public franchises. They cross with their pipes innumerable highways and streets, a privilege that does not pertain to a strictly private business and is not enjoyed by citizens generally. These lines could not exist without these privileges any more than a railroad could exist without them. Some of the lines run upon the rights of way of railroads; all of them cross or run under these rights of way. These railroad rights of way are all obtained by public authority and are subject to a public control. Some of the lines cross or run upon the public domain and Indian lands by special grants. These are special privileges granted under an act of Congress and limited to pipe lines; these privileges are not possessed by citizens generally, and can only be enjoyed by the person or corporation who is building and intends to maintain a pipe line for the transportation of oil.

The line of decisions is well understood which hold that *quasi-public* corporations and public utility companies receiving such grants, privileges and franchises are subject to Governmental regulation.

Public markets.—A statute of Minnesota declared that "All elevators and warehouses in which grain is received, stored and shipped or handled, and which

are situated on the right of way of any railroad, depot grounds, or any lands acquired or reserved by any railroad company" to be public elevators, and to be under the supervision and subject to the inspection of the Railroad & Warehouse Commission of the State of Minnesota. Penalties were provided in case of a failure to comply with the act. A firm operating such a warehouse, strictly for their own purposes, was charged with a violation of the statute. The case came to this court, and the court, speaking through Mr. Justice Harlan, said:

> The State court well said that the defendant's warehouse could be fairly regarded as "a sort of public market where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain." We cannot question the power of the State, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits,—such a license not being required for the purpose of forbidding a business lawful *or harmless* in itself, but only for purposes of regulation. (*W. W. Cargill Co.* v. *Minnesota ex rel. Railroad & Warehouse Commission*, 180 U. S., 452, 467–468.)

That is precisely what these pipe lines do. By their own agents they grade, measure, and purchase the oil. There are no other markets at which the producer can sell his oil. They are the public markets

and the only public markets for crude oil. These markets are presided over and absolutely controlled by the pipe lines.

Extent of regulation.—The foregoing cases establish beyond any question that corporations exercising a business affected by a public interest; enjoying public franchises; controlling public markets; fixing the prices of commodities, and which are "virtual monopolies," are subject to governmental regulation. It only remains to determine to what extent this regulation may be carried.

It will be observed that running through all of these cases the doctrine, stated in various forms, is that these corporations "must submit to be controlled by the public for the common good, to the extent of the interest" which the public has in the business. The public is interested in various ways. It is interested in having reasonable rates for the services rendered; in having proper and good facilities; in having prompt and efficient service; equality of charges and service to all citizens alike; in having the business so conducted as to endanger human life, or spread disease or immorality, *or create monopoly*. To prevent these evils, or any one of them, by regulation is within the power of the Government having control over the subject matter. Each case arising must be analyzed and a determination reached as to what the particular interest of the public is in the business, and what the evil is that is to be eradicated or from which the public is to be pro-

tected. If it falls within any of the enumerated cases for the exercise of Governmental regulation, then the regulation must be effective; it must eradicate the evil; it must protect the public against an imminent danger or an existing oppression. Having determined what that evil is the Government may, through its legislative body, adopt any measures that are convenient or expedient and which have direct relation to the matter to be controlled.

But it may be said that while it is true that the States of the Union, exercising a police power, may adopt such regulations, it is not within the power of Congress to do so. But it has been repeatedly held that in regulating, under the power conferred by the commerce clause of the Constitution, Congress may do everything for the protection of life, health, morals and property, and the destruction of monopoly that a State could do under its police power. The safety appliance act, the employers' liability act, the anti-trust act, the act for the suppression of lottery traffic, the pure food and drugs act and the white slave act, all sustained by this court, rest primarily and fundamentally upon the power of Congress, acting under the commerce clause, to do anything and everything that a State can do regarding the same general subject under its police power.

> It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one State to another. Act of February 8, 1897, 29 Stat., 512, c. 172. *United States* v. *Popper*, 98 Fed.

Rep., 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. *Lottery Case*, 188 U. S., 321, 357. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise as in the instances stated and which finds further illustration in *Reid* v. *Colorado*, 187 U. S., 137. This constitutes the supreme falacy of plaintiffs' error. It pervades and vitiates their contentions. (*Hoke and Economides* v. *United States*, 227 U. S., 308, 321.)

Public interest in pipe lines.—We come to inquire then, What is the public's interest in the business of the appellees? It is this. By the discovery and development of a new mode of transportation, and by securing absolute control of practically all of it, and by refusing to conduct this transportation business for the public, and using the necessity for pipe-line transportation as a compelling force, the appellees effectually control the prices of a great domestic product, thus producing not only a virtual monopoly but a complete monopoly of the oil business. We have already stated the facts which show this conclusively. It does not meet the question at issue to show that since the passage of this act, and by the enforcement of the antitrust act, the Standard Oil Co. has been compelled to loosen its grip to some extent upon these pipe line companies. The validity of a legislative act must depend upon the conditions

existing at the time the act was passed. The court may not say that the conditions which compelled this enactment have since been changed and in our judgment, therefore, the act ought not to be upheld and enforced. Even if this were possible, we might say that conditions still exist which would warrant the legislation. These pipe line companies are still supplying the same refineries with the crude oil. They still fix and maintain a monopoly price to the producer of crude oil and to the refiner who buys the crude oil of them through the control of this means of transportation. But we insist that the court must consider the conditions existing in 1906, when this act was passed, when the Standard Oil Co., as a single controlling proprietor, fixed the prices of crude oil, monopolized it, and fixed the price and controlled the refined products. Its only competitor was the Pure Oil Co. and a few small refineries. The proceeding in the *Standard Oil Case, supra*, broke, to an extent, the monopoly created by a unified ownership of the stocks of all the companies; but that dealt with only one part of the monopoly. At the other end of the line in the fields of production, a complete monopoly of the product and the price is maintained. The only method of transporting crude oil being in the hands of these so-called private operators, they refuse to transport unless the product is sold to them at their price.

The remedy.—There was but one way in which this monopoly could be broken, and that was to open

the fields of production to competitive buyers; to make it possible for competing refineries to be established and maintained; these results could only be secured by separating the business of transportation from the business of buying and selling, and from the business of refining. This segregation could only be accomplished by declaring that the business of transporting oil by pipe lines should be carried on by common carriers. No other remedy could reach and cure the evil.

It is not to be supposed that the individual producer will ship his own oil to the refinery. The growers of wheat do not ship their individual products to the market; they sell to the buyers in the market, and the buyers are there because they can transport their purchases over common carrier lines to any market. They represent the mills that grind wheat into flour, the exporters who send it abroad, those who hold the grain in elevators for a profit. These buyers of wheat would not be in the fields of production were it not for the fact that the transportation lines are common carrier lines. Along these rail lines there are mills and elevators. These could not exist if the transportation lines for the carrying of wheat were monopolized and controlled by a few mills and a few elevators on the seaboard or in the middle west.

Coming back now to our first proposition, that the regulation extends to the correction of the evil; the protection of the interest which the public has in the business; it must be clear that this statute of 1906

was the remedy, and the only effective remedy that could be applied. It was therefore within the plenary power of Congress over interstate commerce to declare that the carriage of oil by means of pipe lines should be by common carriers under the act.

Connection with interstate commerce.—That this subject matter, the monopoly of crude oil, was connected with interstate commerce and within the control of Congress, can not be doubted when we consider that it was created directly through, and by means of, the agencies of transportation, and that transportation was interstate commerce.

> Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. *Northern Securities Co.* v. *United States*, 193 U. S., 197, and authorities there cited. In this connection we may refer to *Johnson* v. *Railroad*, 196 U. S., 1, relied on in argument, which case arose under the act of Congress of March 2, 1893, 27 Stat., 531, c. 196. That act required carriers engaged in interstate commerce to equip their cars used in such commerce with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes. But the act upon its face showed that its object was to promote the safety of employes and travelers upon railroads; and this court sustained its validity upon the ground that it manifestly had refer-

ence to interstate commerce and was calculated to subserve the interests of such commerce by affording protection to employes and travelers. It was held that there was a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object. (*Adair* v. *United States*, 208 U. S., 161, 177.)

In the *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S., 361, it was held by this court that the provisions of the interstate commerce act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. The foregoing statement is made by the court in *United States* v. *Delaware & Hudson Co.*, 213 U. S., 410–411.

In the amendment of June 29, 1906, usually referred to as the commodities clause of the Hepburn Act, it was made "unlawful for any railroad company to transport * * * any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part," etc. This act was considered by this court, and as construed was held to be "within the power of Congress to enact." (*United*

States v. *Delaware & Hudson Co.*, 213 U. S., 366; *United States* v. *Lehigh Valley Railroad Co.*, 220 U. S., 357.)

The commodities clause separates the business of transportation from the ownership of the commodity shipped. While the cases are not the same, the principle involved in the three last cases cited sustains in part the doctrine contended for in this case, namely, that Congress has the power to segregate the business of transportation from any other business. If this can be done, it would seem clear that it can declare that the transportation shall be carried on by common carriers where legislative reasons exist for doing so.

We respectfully submit that, under the general law announced in the foregoing cases, Congress had the power to declare that thereafter all persons or corporations engaged in the transportation of oil by pipe lines should be common carriers, for the purpose of protecting the interest of the public in a business "affected with a public interest."

II.

Does the act to regulate commerce as amended in 1906, require that all persons and corporations thereafter transporting oil by pipe lines, shall be common carriers under and subject to the act?

By the amendment of June 29, 1906, the act is made to read as follows:

> That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other com-

> modity, except water, and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, *who shall be considered and held to be common carriers within the meaning and purpose of this act.*

Section 6, requiring schedules of rates to be filed with the commission, was also amended, and in so far as it affects the issues in this case, it reads as follows:

> Any common carrier subject to the provisions of this act shall file with the commission created by this act * * * schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, *by pipe line*, or by water when a through route and joint rate have been established.

It is claimed by the appellees that the language used in the amendment to section 1 was not intended to apply to private pipe lines; that is, pipe lines which did not, at the time of the adoption of the amendment, hold themselves out as common carriers, or did not offer to transport oil for the public.

The statute as amended seems to be plain and unambiguous, but before discussing the language used it is proper under the rule laid down by the Supreme Court, hereafter cited, to refer to the debates in Congress for the purpose of throwing light upon the language and phrases adopted, and also to show the purposes of, or reasons for, the legislation.

These debates show (*a*) that the language adopted was intended to and does operate to restrict the transportation of oil by pipe lines to common carriers under the act, and (*b*) that the purpose of the act was to break, and in a measure destroy, a monopoly in petroleum oil.

Debates in Congress.—Pipe lines were not originally included in the "rate bill" introduced in the Fifty-ninth Congress (first session), but on May 4, 1906, shortly after the receipt by the Senate of the special message from the President transmitting a summary of the report of the Commissioner of the Bureau of Corporations on the subject of the oil industry, Senator Lodge introduced an amendment, to be inserted in the first section after the introductory words, "That the provisions of this act shall apply to." The amendment reads as follows (Congressional Record, p. 6361):

> any corporation, or any person or persons engaged in the transportation of oil or other commodity, except natural gas or water for municipal purposes, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to——

Mr. FORAKER said:

> I do not want to make any opposition to the Senator's amendment, but it occurs to me that the amendment ought to be further amended,

so as to provide that it shall apply only to pipe lines *operated for the public*. I do not understand how you could compel a man who has a private pipe line of his own *to become a common carrier*. * * * I think such a limitation ought to be put in the Senator's amendment by an amendment to the amendment that it shall apply to all pipe lines that are *carrying for the public*, and not to private lines that an individual or a single corporation may have laid down and put into operation for its own benefit * * *. [Citing an Ohio corporation, Senator Foraker further said:] They are allowed to exercise the power of eminent domain, and they are, by the terms of the statute, called "common carriers" for that reason. They are supposed to be wholly within the State of Ohio, * * * but a pipe line of that kind [private] is not contemplated to be used as a common carrier, but simply for a specific private individual purpose in the sense that it belongs only to one company (pp. 6361–2).

Mr. TILLMAN. I think the test is whether they are engaged in interstate commerce—whether the commodity they are transporting would come under the rule of interstate commerce—which we are allowed to regulate. That is my idea of the test of this whole question (p. 6362).

Mr. CLAY. Is it not true that if the amendment is adopted the entire provisions of section 1 would apply to it and absolutely make it an article of interstate commerce?

Mr. LODGE. Absolutely.

Mr. CULBERSON. That is the question I suggested. I am not sure it will, but I understand that is the purpose of the Senator from Massachusetts * * * (p. 6363).

Mr. NELSON. In reference to the amendment suggested by the Senator from Ohio to the amendment of the Senator from Massachusetts, I desire to state that if the amendment is adopted it will practically nullify the provision, because every one of these pipe lines can say "*we refuse to do business for the public.*" Practically the [original] amendment would be of no use at all. * * *

Mr. LODGE. Mr. President, *the purpose of this amendment is to bring the transportation of oil and other commodities within the interstate-commerce law.* Oil is one of the greatest articles of interstate commerce carried in this country, and is now absolutely outside and beyond any Government regulation whatsoever. * * * But the amendment suggested by the Senator from Ohio to my amendment, to the effect that no pipe line, unless it carries for the public, shall come, under this rule, *will*, as the Senator from Minnesota [Mr. Nelson] says, *absolutely destroy the value of my amendment.*

The small well owner, to whom there have been pathetic references this morning, has not yet made his objections known to me. I heard within 24 hours after the introduction of my first amendment, on May 28, from the Standard Oil Co. A representative of that company came to see me

on the following day, and represented the uselessness and injustice of this amendment. I have had a great many letters from small oil owners, and I have had a great many letters from independent refiners in support of the amendment, and the objections suggested by the Senator from Maine and the Senator from West Virginia really do not touch the case. * * *

I do not see and I have yet to hear a single valid argument why this great company [Standard Oil Co.], doing this enormous interstate business in one of the greatest articles of interstate commerce and of export and import, should alone be excluded from the supervision of the Interstate Commerce Commission.

There are twenty-eight principal pipe lines in the United States, for the most part trunk lines. There are fourteen local or gathering lines. Twelve of the principal lines are combined in one system under one control, extending from Indian Territory and from Tennessee to the Atlantic seaboard. Five other principal lines form a system under one control, extending from West Virginia and Ohio through the Pennsylvania oil fields to Philadelphia. Of the lines and trunk lines referred to, nine are known to extend across State lines, and (p. 6365) there are two about which there is some doubt, although it is probable that they do. * * * I do not think myself, from reading the definitions of those decisions, that the fact of being com-

mon carriers or exercising eminent domain is necessary to the definition of interstate commerce.

I will read simply the leading definition before I go on, which is *County of Mobile* v. *Kimball;*

"The buying and selling, and the transportation incidental thereto, constitute commerce, and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation."

There has been legislation in regard to pipe lines in twenty-one States. * * *

I have here a list of the authorities, State and United States, simply showing that corporations engaged in the transportation of gas, oil, water, or supplied power, from a point in one State through or into another State, are engaged in interstate commerce. I will ask to have it printed with my remarks, as I have no time to go into it further. * * *

Now, Mr. President, the oil is brought to the trunk lines through small local feeding and gathering lines, as a rule. There are practically two great companies that control pipe lines engaged in interstate commerce. One is the Standard Oil, which is said, roughly, to control 90 per cent. I do not know whether that is correct or not. The other is the Pure Oil. They do not own the wells, and they buy the oil of the well owner, and the charge for the transportation is taken out of the price, as appears in the copies of the certificates and receipts which I have here.

Those well owners are absolutely at the mercy of the pipe lines. I have had cases brought to me, which in this fifteen-minute debate I can not enlarge upon, where an independent refinery has been deprived of its supply of oil because it would not agree to the prices of the pipe lines. *A small well owner is compelled to take the price that is offered by the controller of the trunk line.*

This is not a case of a transportation company owning the property, like a railroad owning a coal mine. It is exactly like a railroad *buying the coal of a coal miner and transporting it.* * * * The pipe line companies buy the oil they use in their own refineries and owing to the fact that they buy the oil, if you put in the words "*carry for the public,*" the pipe lines go right out from under this amendment in my judgment. * * *

It seems to me that when we are putting under the control of the Interstate Commerce Commission transportation that is partly by rail and partly by water we ought not to omit transportation of one of the greatest and most useful commodities that enter into daily life because it is partly by pipe line and partly by rail and partly by water. * * *

No small oil well owner is going to be hurt. There is no proposition, as the letter read by the Senator from Maine (Mr. Hale) indicates, to push up the prices or push down the prices and make it impossible for a pipe line to operate. It is simply to give relief, if relief is sought, to those who find that they are not

> fairly treated, or think they are not fairly treated by the pipe lines, through which alone, practically, they can get their commodity to market (p. 6366).

May 15 the bill was again before the Senate. The clause had been amended to read:

> Any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, at any place within the jurisdiction or within the governmental authority of the United States who shall be considered and held to be common carriers within the meaning and purpose of this act, and to—

Mr. Hopkins called attention to the fact that the words commencing with "governmental authority" were an amendment proposed by Senator Morgan, and called attention to the fact that this would cover the Philippines, Porto Rico, Isthmus of Panama, and Hawaiian Islands (p. 6896). In a message by President Taft, upon this feature the provisions in the Lodge amendment are referred to. He says:

> The wisdom of a provision *of law declaring that a pipe line in this country shall be made a common carrier between States* is wholly aside from the point, for it is not at all analogous to the one I am discussing. The pipe lines constructed in the States are pipe lines under permanent franchises, *much more likely to invite* in this country *the monopoly* than a mere

revocable license. The conditions on the Isthmus are, of course, entirely unsettled; * * * if it becomes wise to require that these pipe lines [in the Philippines] be made common carriers in the future, the President may effect this result *under the revocable license by withdrawing the license unless the change is made, or it may be done by act of Congress*, but, with deference, I think it ought for the present to be left to the President's discretion to say when the occasion has arisen for the change (p. 6896).

Mr. MORGAN. Then I take it for granted the Senator from Illinois (Mr. Hopkins) *wants to reverse the action* taken by the Senate *in regard to making pipe lines common carriers* and is opposed to the entire project. He does not want the Government of the United States to *declare that pipe lines are common carriers* and that they are subject to regulation as to rates by the Interstate Commerce Commission. Is that the situation? (p. 6896).

May 17, the rate bill being under consideration, Mr. Nelson said:

The Standard Oil Company has a large pipe line running through the country. That pipe line has many feeders. Private parties built pipe lines to the trunk line to run the oil from their own wells which are connected with the pipe lines of the Standard Oil Company, which company buys from these various small dealers. The different parties who have these feeding lines from their wells ship their oil to the trunk line. Their relation to the public is exactly the same as the Elevator Company to

> which I have referred in Minnesota. We have as much right to control such pipe lines as the public have a right to control that grain elevator at Lanesboro in Minnesota. The Standard Oil Company purchases oil from the independently shipping oil owners, who have built little feeding lines connecting with the trunk lines of the Standard Oil Company. It *purchases their oil and holds a monopoly of the use of the main line;* and unless it is put under the control of the Interstate Commerce Commission it can carry on its business with impunity, *and practically destroy all the independent dealers and the independent lines* (p. 7001).

Mr. Teller, who took an adverse position, contended against the language of the Lodge amendment on the ground *that it interfered with private ownership,* recognizing that the purpose and intent of the amendment was to cover all lines doing interstate business (p. 7008).

Mr. Clay, discussing the commodity clause, said:

> A private company, engaged in transporting its own oil or gas through pipe lines constructed at its own expense, should not be deprived of the privilege of transporting its own oil or gas. These lines are used for no other purpose, and if they can not be used for this purpose then they must be abandoned. The rule must be, then, for railroads, because they exercise the right of eminent domain and were chartered to do business for the public.

His position being that the *effect of the language* of the Lodge amendment would be to make them com-

mon carriers and deprive private lines of their right to carry their own oil (p. 7009).

Mr. STONE said:

> I have not believed, Mr. President, that the pipe lines constructed by a company or an individual for use solely in his or its own business, or for transmission of his or its own product and used for that alone, would be subject to the *provisions of this proposed law*. But the first section of this bill *does provide that all pipe-line companies engaged in carrying oil* or other commodities from one State or District to another *shall be considered common carriers* (p. 7016).

Mr. Bacon undertook to give a different meaning to the words of the amendment so as to make it apply only to pipe lines that were common carriers, using the same construction contended for in this case (p. 7016).

The bill being again under consideration in the Senate on June 25, Mr. Tillman said:

> We had gladly consented to the change in the first conference *placing pipe lines unequivocally and in the plainest possible language in the list of common carriers*, but with this change of phraseology Senators will see the possibility of numberless lawsuits.

Mr. Tillman was discussing the commodity clause and the change substituting the word "railroad" for "common carrier" and he further said:

> Again, I want to get back to the change of "common carrier" to "railroad." As I said,

instead of the producing of oil along with the producing of coal being divorced from the transportation of oil and the transportation of coal as the Senate intended, the provision simply limits the divorce to railroads, and by changing "common carrier" to "railroad" you let the Standard Oil Company loose absolutely from this provision [commodity clause], and we encourage and perpetuate that grinding monopoly (p. 9103).

Mr. LODGE said:

I believe to *make them common carriers in the language of the act* would bring the great trunk lines within the operation of the act, and, I think, will do it sufficiently so far as carrying oil to market. Of course, what all oil producers desire to reach, is a line which will carry their oil to the great distributing centers and especially to the seaboard. I think under this clause as it now stands these trunk lines which are practically 90 per cent in the control of the Standard Oil *may be compelled to take the oil of other producers.*

When the commodity amendment was added they became then, *as we have defined them to be, common carriers.* They then would have been unable, if engaged in interstate commerce, of course, to own oil wells or to own oil. They would have done simply a carrying business. It was changed to "railroad" in that clause *in order to relieve the independent company* [from the commodity clause].

My own belief is that what is relieved is the Standard Oil. The commodity amendment was not my amendment, but *was added after*

the amendment I offered had been agreed to. * * * I can see no possible reason why the men controlling these great trunk lines of pipes should not make it *a carrying business* and be content to *carry oil for all producers at a reasonable rate.* We make the railroads do it, and I do not see the slightest reason for this change. But there is no doubt that the effect of the change [commodity clause] is to take the pipe lines out of that section and leave it to apply only to the railroads (p. 9104).

Senator Elkins presents as a part of his argument the West Virginia statute making pipe lines common carriers (p. 9250).

The bill being under discussion June 26, Mr. Long said:

This bill makes all pipe lines common carriers without any exception.

Mr. MALLORY. *Yes; this bill says that,* but this bill can not make a common carrier out of a line that is not a common carrier.

Mr. LONG. *That will be for the courts to determine* (p. 9254).

Mr. FORAKER. A majority of the Senate insisted that this provision should apply, as the Senator from Massachusetts contended it should, to all pipe lines, *without regard to whether they were carrying for the public or not,* his contention being that such a qualification would destroy the effect of what he was trying to accomplish (p. 9255).

Mr. LONG. But *the intention of this amendment,* as the Senator will admit, *is to take in all pipe lines. There are no exceptions,* and it

will take a decision of the courts to determine whether the Senator and myself are right in that proposition (p. 9256).

Mr. LONG. If Congress has the power to make a common carrier out of a pipe line that is owned by a corporation which is using it to transport its own product, *and this is so in this law*, it should except pipe lines in the commodity section *and not prevent the owner of a pipe line that crosses a State line from transporting his own oil in his own pipe line* (p. 9257).

Mr. Long was here discussing the Prairie Oil & Gas Co. (p. 9256).

Mr. RICHARDSON. We have declared them in this bill to be common carriers, and unless we had "railroad companies" for "common carriers" in the fifth amendment *we would have prohibited these pipe lines from carrying their own oil* (p. 9581).

Mr. Elkins, referring to telegrams and petitions, said:

The signers of these telegrams expressly say that they have no objections *to making pipe lines common carriers*, but they protest against not being permitted to transport their own product (p. 9647).

The Lodge amendment being before the House of Representatives on June 26, 1906, Mr. Rhinock brought before the House facts and claims regarding the different pipe lines, and stated the purpose of the law as he understood it. He informed the House fully with reference to the objections made by so-called private lines, and presented arguments in

favor of covering all trunk lines with a provision *making them public carriers.* He based his line of argument, in favor of the constitutionality of the bill, upon two grounds, (1) that they exercised the right of eminent domain and (2) that they constituted a public market and therefore were subject to control. He does not discuss the question upon the broad fundamental principle that Congress has plenary power over all interstate commerce and can declare by what agencies it may be carried on. But the discussion by Mr. Rhinock is important as showing the understanding of the controversy in the House as to the scope of the Lodge amendment.

Mr. Rhinock refers to a House bill, introduced by him (H. R. 15438), entitled "A bill to declare certain persons, firms, associations, and corporations to be common carriers and subject them to the provisions of the interstate commerce act," and said:

> *I want pipe lines to be common carriers* under the law, and whether that end shall be reached under the separate bill introduced by me last February *or by the adoption of the Lodge amendment to the Senate bill is immaterial.* * * * It has been suggested that pipe lines for oil are private lines, private property, and that this legislation will affect them injuriously. * * * The contention is that all of the pipe lines now doing business throughout the country are public and not mere private lines. It is true that they claim that they only transport their own oil—that they carry only their own goods.

He then proceeds to discuss the question upon the two propositions above named—exercise of eminent domain and that through the practice of buying oil at the wells they create public markets; cites the Lanesboro Elevator case (Minnesota), opinion by the Supreme Court of the United States. (180 U. S., 452.) He further said:

> The Standard Oil Company, owning 90 per cent of all the pipe lines of the country, has a large pipe line running through the country which is fed all along its length by a host of feeders. Private parties built pipe lines to the trunk line to run the oil from their own wells, which are connected with the pipe lines of the Standard Oil Company, which buys the oil from these smaller dealers. The different parties who have these feeding lines from their wells ship the oil to the trunk lines and stand in the same relation to the public that the Elevator Company does in Minnesota. The United States has as much right to control these pipe lines as the State of Minnesota has to control private elevator companies.
>
> The Standard Oil Company needs this regulation most. It purchases the oil from the independently shipping oil owners who built the feeding lines to the great trunk line of the Standard Oil Company. It purchases their oil and refuses to pipe it beyond the point of intersection with the oil owners to a possibly better market beyond. *It monopolizes the trunk line carriage, and is subject to control on the ground that it buys oil from the owner, measuring and grading it in their own way, and there-*

fore occupies the position of a public market subject to public control.

The pipe lines ought to be brought under the control of the Interstate Commerce Commission (p. 9337). Its enormous trunk line—the largest in the world—makes it peculiarly appropriate that it should be brought under this control. * * *

And I am opposed to any change in the verbiage of the bill which shall attempt to except such pipe lines from the operation of the law "which do not transport for hire" or "transport for the public." While the Standard Oil Company does the greatest business, it is not therefore necessary for us to legislate against them alone.

The law must be general, and all pipe lines must be treated alike. * * *

Conclusions to be drawn from these debates.—One can not read these debates without reaching the conclusion, beyond the peradventure of a doubt, that the Senate and the House, when the amendment of 1906 was finally adopted, understood that the language of the Lodge amendment meant to and did declare that all persons or corporations thereafter operating pipe lines for the interstate transportation of oil should be, and should be held to be, common carriers; that Congress had before it (1) the system of pipe lines owned, operated, and controlled by the Standard Oil Company, and (2) the pipe lines owned, operated, or controlled by the Pure Oil Company, and that the purpose of that legislation was to bring these, with all other lines,

under the regulating power of the Interstate Commerce Commission, thereby breaking the existing monopoly. The pipe lines owned, operated, and controlled by the Standard Oil Company at that time are set forth in the decree of the Circuit Court of the United States herein referred to, a copy of which is Exhibit A to the answers of the Interstate Commerce Commission (Rec. No. 482, p. 71). The lines connected with the Pure Oil Company are the United States Oil Company and the Producers and Refiners Oil Company.

The monopoly under consideration by Congress, and aimed at by this legislation, was created by the methods and practices of operating pipe lines, in connection with the great refineries, buying crude oil at the wells in the fields of crude-oil production, and refusing to carry oil through the pipe lines upon any other condition than that the producer should sell his product to the pipe-line company or the refineries at arbitrary prices fixed and posted at the wells by the pipe-line companies. It was connected with, and resulted directly from, the method of transportation. Only as a private business could these prices be controlled and competition excluded.

Rules of construction.—The general purpose and aim in construing a statute is to ascertain its true meaning and its true application to concrete cases. For this purpose resort may be had—

1. To the language and arrangement of the statute.

2. The intention and object to be secured by the legislation.

3. Matters and circumstances attending its passage.

4. Sense in which it was understood by the legislators and contemporaries.

5. Its relation to the law into which it is incorporated as an amendment.

6. As amended, the statute must be considered as a whole.

(Cyclopedia of Law and Procedure, vol. 36, pp. 1102, 1136, 1138 et seq.)

Aids to construction.—The statute, considered as a whole, furnishes the best guide for its construction, and the ascertainment of the sense in which the words of an amendment were used.

But if, after considering the language of the entire statute, there remains a doubt as to its meaning, the court may consider extrinsic matters, such as the circumstances existing at the time of its enactment. (*Standard Oil Co.* v. *United States*, 221 U. S., 1, 50.)

Other legislation on the same subject may be considered, and the results that would follow a different construction.

> Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning, of particular provisions in it. (*United States* v. *U. P. R. R. Co.*, 91 U. S., 79.)

The purpose of the act.—The purpose of the amendment to the act in 1906 is clearly shown by the debates in Congress, to have been to bring the systems of pipe

lines, carrying the crude oil of this country, under the act to regulate commerce and to require them to be common carriers if they continued the business of transportation. The reason for this regulation was a desire to break the monopoly and to give the producers of crude oil open markets. It was not expected that the producers would make individual shipments of oil, any more than the producers of wheat ship their wheat to the great markets. The farmer sells his wheat to the general buyer; the general buyer having an open way to the great markets over common-carrier lines of railroad and boats, it results that there are many buyers in the markets. The farmers get the benefits of competition, not by shipping their own wheat, but by marketing it where there are many buyers. It had come to pass that only the great refineries, who could own, or operate, or control the pipe lines, were the buyers of crude oil in the fields of production. If a person with capital desired to erect a refinery, and thus extend the business and the competition, he must build a pipe line for his refinery. If competing refineries existed, individual buyers could not go into the fields of production and buy the oil, because they could not ship it to any refinery except one controlling a pipe line and these refineries were supplying themselves through their own pipe lines *at arbitrary prices fixed by themselves.* The purpose of the legislation, therefore, was to open the fields to competition, that there might be buyers of oil, as there are buyers of grain, in the fields of production; that there might be an

inducement for capital to go into the business of refining, with equal rights over the lines of transportation. To accomplish these ends, and others that might be named, Congress sought to and did declare that the interstate transportation of oil should be by common carriers only. It did not apply the commodity clause to oil as it did to coal. The existing refineries, therefore, can ship their supplies of oil, but in the future must buy in open markets in competition with any other buyers or refineries that seek the oil. It is only the monopoly that is destroyed. These pipe lines will still continue to carry all the oil that the refineries can use and all the oil that any additional refineries may require; they will meet the increased demand for transportation by increased facilities, as the railroads have done, provided they are limited to the business of transportation.

To destroy a monopoly, created by transportation methods, is a proper object of legislation under the commerce clause.—In *Pearsoll* v. *Great Northern Railway Company*, 161 U. S., 646, 676:

> Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect—in short, puts the public at the mercy of the corporation. There is, and has been, for the past 300 years, both in England

> and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We can not say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language.

In *U. S.* v. *Knight*, 156 U. S., 112, Mr. Chief Justice Fuller, speaking for the court, said:

> The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. *But it may operate in repression of monopoly whenever that accrues within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.*

The whole country was aroused by this monopoly of a national product, valued at nearly $150,000,000 per annum. A special inquiry had been instituted by the Department of Commerce and Labor, under a resolution by Congress, into the industry, and this enactment was the result of a widespread public conviction, supported by the report of the department, that the monopoly was deep-seated and perilous—a menace to the public welfare.

The language of the statute.—Bearing in mind, then, the objects, so clearly stated in the debates, let us analyze the separate declarations in this amendment to the law.

The act to regulate commerce was enacted to control or regulate common carriers; all rail carriers, and such others as might be brought under it. Every person or corporation subject to regulation under this act was, or was to become, a common carrier, otherwise the act would be inappropriate. The amendment follows the declaration in the original act, that "the provisions of this act shall apply to," and reads, any corporation, person, or persons "*engaged in the transportation of oil by pipe lines.*" This declaration has no condition or words of limitation; it applies to a commerce, "the transportation of oil by pipe lines." All corporations or persons engaged in the interstate transportation of oil by pipe lines are included. The amendment again declares that these corporations and persons, the agents of this transportation, "shall be considered and held to be common carriers within the meaning and purpose" of the act. "*They shall be considered*" is plain, unambiguous language, and is susceptible of only one meaning when used in a public statute. It governs the action of all legislative, executive, and judicial officers having to do with the statute, or the business, and declares that these officers and departments of government shall *consider* these corporations and persons so engaged *to be common carriers.*

Not only that, but another word is inserted, they shall be "*held*" to be common carriers. This is to make the declaration plain to the judicial department of government when called upon to interpret this statute and enforce it. They shall be *held* to be common carriers under the act.

The language could not be plainer or less unambiguous.

It may be observed also that Congress subsequently, in amending this act, June 18, 1910, brought under the statute "telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages" interstate, by inserting the designation of these companies into this amendment, preceding the words which we have been discussing, "who shall be considered and held to be common carriers." These telegraph and telephone companies were private companies; they had no power of eminent domain, and yet, if they are under the act and subject to it, as undoubtedly they are, they are made so by the very language which was made applicable to all pipe-line companies.

Therefore, considering the language used, its relation to the statute, the debates in Congress, the purposes for which it was passed, the plain reading of the words and the effect to be given the whole act, the statute clearly declares that all pipe-line companies, whether corporations or persons, who may voluntarily transport oil by pipe lin s, shall be common carriers under and subject to the act to regulate commerce.

III.

If the act as amended does require that all corporations and persons thereafter engaged in the interstate transportation of oil by means of pipe lines shall be common carriers, is the act constitutional?

To answer this question requires a consideration of the comprehensive powers of Congress over interstate commerce, the restriction upon such power in the fifth amendment to the Constitution, and a careful analysis of the act under consideration and its effect upon the business of the appellees.

Power of Congress over interstate commerce.—The power of Congress is fixed by two clauses in the Federal Constitution, article 1, section 8, paragraphs 3 and 18. Summarized for this case, Congress has power to "regulate" interstate and foreign commerce and make all laws necessary and proper to carry into effect the power to regulate.

Mr. Chief Justice Marshall, in *Gibbon* v. *Ogden*, 9 Wheaton, 1, 196, stated this power as follows:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

This definition has been accepted by this honorable court without deviation since it was uttered. It has been elaborated and applied to many varying cases; and it may be said that in all cases the power of Congress over interstate and foreign commerce has

been declared to be plenary, with all the incidents of sovereignty that attend the manifestation and exercise and application of this power. In the *Lottery Case* this court, speaking through Mr. Justice Harlan, defined it as follows:

> * * * They also show that the power to regulate commerce among the several States is vested in Congress *as absolutely as it would be in a single government*, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is *plenary, complete in itself*, and may be exerted by Congress *to its utmost extent*, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and *that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because*, in their opinion, such regulations may not be the best or most effective that could be employed. (188 U. S., p. 353.)

In the exercise of this power over interstate and foreign commerce the field of its exercise is coextensive and the subjects as innumerable as in the domain of the police power by the States. (White Slave Cases, 227 U. S., *supra*.)

Power to prohibit.—The power to regulate includes the power to *prohibit* particular interstate and foreign commerce. This question arose in the first case arising after the adoption of the Constitution, and engaged wide-spread attention in the United States.

Congress, on December 22, 1807, passed an act entitled, "An act laying an embargo on all ships and vessels in ports and harbors of the United States," and a supplemental act was passed January 9, 1808. Privately owned and operated ships were carrying foreign commerce from ports of the United States to ships at anchor and to foreign ports. This act prohibited their business. The case was heard in the District Court of the United States for Massachusetts, and the opinion written by Davis, district judge. It was conceded that the act was not a war measure and was passed in the interests of commerce and peace. This was the legislative reason for the act. The act was sustained as being within the power of Congress, and the following excerpts from the opinion are here given:

> * * * Stress has been laid in the argument on the word regulate as implying in itself a limitation. Power to regulate, it is said, can not be understood to give a power to annihilate. To this it may be replied that the acts under consideration, though of very ample extent do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree or extent of the prohibition be adjusted but by the discretion of the National Government, to whom the subject appears to be committed? * * *
>
> Further, the power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself or tending to its advancement, but in our na-

> tional system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but the national right or power under the Constitution to adapt regulations of commerce to other purposes than the mere advancement of commerce appears to me unquestionable. (*United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255.)

In *Gibbon* v. *Ogden, supra,* Mr. Chief Justice Marshall refers to these acts and concedes the power of Congress therein exercised. He said:

> But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case an embargo is no more a war measure than a merchantman is a ship of war because both are vessels which navigate the ocean with sails and seamen.
>
> When Congress imposed that embargo, which for a time engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war, measure. The persevering earnestness and zeal with which it was opposed in a part of our country which supposed its interests to be vitally affected by the act can not be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted

> hostility will not be imputed to those who were arrayed in opposition to this. * * * They denied that the particular law in question was made in pursuance of the Constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce.

The right to prohibit particular commerce has since been sustained by this court, where the prohibition has been exercised for the public welfare, notably in the meat-inspection and food-and-drugs acts, the lottery act, the commodity-clause act, and the white-slave act. This court sustained this power to prohibit, by its construction of the interstate-commerce act forbidding discrimination, and enforced it against the carrier, thereby rendering it impossible for the carrier to deal in the commodities which it carried. In reference to this practice, the court said:

> It was to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an

> advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof, and the sole seller at the place where the products were to be marketed; in other words, to create an absolutely monopoly. (*New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S., 361, 392.)

Thus we see that in the exercise of the power of regulation Congress may expressly, or by general prohibitions which the court will construe and apply in particular cases, prohibit absolutely a particular kind of transportation, which without such prohibition would be perfectly lawful.

Fifth amendment to the Constitution.—The only prohibition upon the exericse of this broad power of regulation is that contained in the fifth amendment, prohibiting the taking of property without compensation and without due process of law. This provision is so familiar it need not be quoted.

As the prohibition in the statute under consideration is based upon the right to prohibit monopoly, we need not spend much time in citing authorities upon this branch of the case. If the Lodge amendment had for its purpose the destruction of a monopoly created by the transportation of oil by means of pipe lines by private persons or corporations, and

it has that effect only, the destruction of the monopoly is not a taking of property prohibited by the fifth amendment. It is an exercise of what is commonly denominated the police power, and any loss must fall upon the owner. (*North. Trans. Co.* v. *Chicago*, 99 U. S., 635; *Lottery Case, supra; N. Y. & N. H. Ry. Case, supra; Union Bridge Co.* v. *U. S.*, 204 U. S., 364; *Commodities Clause Case, supra; South. Ry. Co.* v. *U. S.*, 222 U. S., 26.)

Effect of the act upon the business of the appellee.—The business of transportation as a part of "commerce" is a distinct business. If a corporation is being organized to carry on a transportation business, it must be stated as one of the objects for which the corporation is organized. This was recognized by the Standard Oil Company in amending its charter in 1879. It is an object stated in the articles of incorporation and the articles of association of the appellees in this case. It was so recognized in the New Haven case and in the commodity-clause act and the decisions thereunder. True, without statutory prohibition corporations may include this transportation business with other businesses, but this does not diminish the force of the statement that the business of transportation is separate and distinct from all other occupations.

Three appellees are carriers, buyers, and sellers.—Three of the appellees are incorporated and engaged in the business of carriers of oil by pipe lines and the business of buying and selling oil. They do not consume or refine crude oil. Any effect of the act which

affects refineries, therefore, does not affect these three appellees. They are practically and for all the purposes of this case in precisely the same position as to crude oil that the railroads were as to coal in the New Haven case. They buy and sell and they transport the commodity. Each "concentrates" in its own hands the products which were held for shipment and selects "the favored persons to whom he would sell," thus enabling the carrier, in connection with the purchasers, "to create an absolute monopoly."

The effect of the act upon these three appellees is to prohibit the private carrying of oil by means of pipe lines, and to require them, if they voluntarily continue this occupation, to transport as common carriers. The act prohibits particular transportation—private transportation by pipe lines—but it throws open to the widest extent the transportation by pipe lines by common carriers. This does not destroy or impair the business of transporting oil by this means. In fact, these petitioners allege that it will increase their business and require additional facilities. The act does not prohibit their charging and collecting reasonable rates for such transportation service; it therefore does not require a service for the public without compensation. Nor does the act compel these appellees to be common carriers. As stated in the *Munn case:*

> He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.

It is insisted, and so held by the Commerce Court, that the act *in effect* compels them to be common carriers, as it can not be supposed that they will withdraw from the business. That is not the edict of Congress. It is a compelling, economic force, and good sense that will lead these appellees to continue a very prosperous and profitable business.

The conclusion is inevitable that the only effect of this regulation by Congress is to destroy the monopoly occasioned directly by the private carriage of crude oil by pipe lines, and that in every other respect the traffic and the business are free and unaffected. It can not, therefore, be said that this is a taking of property within the meaning of the fifth amendment. It is a true and proper regulation of this transportation business by these means, which have come into being in the last few years and absolutely dominate the oil industry.

Three are carriers and refiners.—The three other appellees are engaged in the transportation of oil as carriers and in the business of refining crude oil. By the private carriage of the crude oil through their pipe lines and the purchase of it at the wells, either by their own pipe lines or connecting pipe lines, they have created and are maintaining a monopoly. The keen eye and shrewdness of the monopolist is not better illustrated or exemplified in the history of trade and commerce than it is in the move by which the Standard Oil Company acquired its present pipe lines. As we have seen, up to 1906 these pipe lines were

owned and operated by corporations which, under the act of incorporation and the laws of each State under which they are severally incorporated, required them to be common carriers. The fact that they had gone outside the State in building pieces of their lines did not change the character of the agent. It was still a common carrier by law. The States had not rigidly enforced, and could not be expected to enforce extra-territorially, the provisions of the law making the National Transit Company and the New York Transit Company common carriers. The National Government was about to take action and require common carriers to file their tariffs and authorize its commission to pass upon the reasonableness of the rates; in other words, to compel obedience to the law. The Standard Oil Company owned the two transit companies absolutely, and it immediately proceeded, through its controlled directorates, to cut off the feet of these common carriers in order to prevent the carriers being of any practical service to the public. They stopped the common-carrier lines at Unionville, Centerbridge, and Fawn Grove, places in the open fields, with no rail connections; nothing at either place to induce the building of a refinery or the location of any sort of a consumer of crude oil. By that procedure and the operation of these ends of the lines to the seaboard they undertook to prevent the common-carrier agent from making through rates—the reasonableness of which could be passed upon by the Federal Government—from the Appa-

lachian field to the seaboard. Another purpose was to prevent the erection of independent and competing refineries upon the seaboard, which otherwise could be served by these common carriers.

The purpose in the mind of the Standard Oil Company is the purpose in the mind of all the other appellees who are refiners, namely, to monopolize the one single efficient method of transporting crude oil. To control the common-carrier lines they extend their own facilities far enough either to a field or to a connection with another pipe line to monopolize the oil business through their lines and thereby prevent the establishment of competing refineries. What has been said with reference to the effect upon the other three appellees is equally true of the effect upon these three appellees. They may "withdraw" from the business, but, if they voluntarily elect to continue as common carriers, their pipe lines will be filled with traffic and they will be entitled to collect reasonable rates for the service. The only loss to them will be the monopoly occasioned by through private transportation. The only destruction occasioned by the act is the destruction of their monopoly.

Pipe lines carry all the traffic.—The pipe lines are carrying to-day the entire output of crude oil east of the Rocky Mountains. Under the act they will not carry less, because transportation by pipe line is so much cheaper than transportation by any other method that this instrumentality will continue to have a monopoly of the traffic. The companies

operating these pipe lines, under the protection of the Federal law, will receive reasonable rates as compensation for the transportation service. There is, therefore, no destruction or impairment of property rights protected by the fifth amendment.

Weems case.—The case of *Weems Steamboat Co.* v. *Peoples Co.*, 214 U. S., 345, is the authority upon which the Commerce Court decided these cases. That was a suit between water carriers and did not involve in any sense, or to any degree whatever, a State or Federal enactment. In the *New York, New Haven case*, as we have seen, the question was the violation of the Federal law prohibiting discrimination. In *The Lottery case, Commodities Clause case*, and the *White-Slave act* the court was called upon to give effect to legislative acts. The distinction between such cases and the case of private litigation between private individuals or corporations is as wide as the poles, and the latter has no authoritative force or effect in determining the former. The one deals with purely private rights without any violation of express public law, and the other deals with the force and power of sovereignty; and legislation respecting the particular matter.

We respectfully submit, therefore, that this case has no determining effect in these cases.

The Commodity Clause case.—The act in that case, as construed by this court—

> forbade a railway company from transporting in interstate commerce articles or commodities

(1) which it has manufactured, mined, or produced; (2) which had been so mined, manufactured, or produced under its authority; (3) which it owns in whole or in part; and (4) in which it has an interest, direct or indirect.

U. S. v. *Lehigh Valley R. R. Co.*, 220 U. S., 257, 265.

The court held that the first two prohibitions, if literally construed, had no time limitation, and therefore any coal produced by or under the authority of the railroad company could not be shipped *at any time*. It was a total prohibition upon this traffic. No reason could be assigned for such a prohibition; there was nothing in the commodity or traffic that was objectionable. The court found that the purpose of that act was to *dissociate the business of transportation from the business of producing and buying and selling coal*. The *public welfare* called for the use of the coal, and therefore its shipment. If the coal was sold and disposed of by the railroad company before shipment, it would place the first two prohibitions upon the same basis as the last two prohibitions, namely, that no railroad company could ship coal which it had produced *and owned* at the time of shipment or which it had purchased and owned at the time of shipment. The grave constitutional question involved in the case was not whether great property losses prevented Congress from exercising its power to regulate commerce, but whether the total prohibition of a traffic absolutely devoid of any inherent evil or objection could be arbitrarily or capriciously forbid-

den by Congress where great property interests would be affected.

Legislative reason.—The whole line of decisions, from the *Brigantine William,* to the present time, recognized that there must be a proper balance between the power of Congress and the constitutional protection of property against arbitrary power. There must be *some reason* to support an act seriously affecting property rights apparent upon the face of the legislation. In the case of the embargo in 1808the plain purpose of the act was to protect our commerce and aid in maintaining peaceful foreign relations. In the cases involving quarantine service the reason for such a prohibition was to prevent the spread of disease affecting health and property interests. In the *Lottery case* the prohibition was based upon a change of public sentiment regarding the morality of the business. All these questions of public welfare are matters *within the consideration and discretion of the legislative branch* of the Government. In determining whether an act or prohibition is valid the court will inquire whether a reasonable cause for the legislation existed, but may not determine the extent or force of it as a cause operating upon the legislative will. Judge Davis stated it as follows:

> * * * Legal discretion is limited. It is thus defined by Lord Coke, *Discretio est discernere, per legem, quid sit justum.* Political discretion has a wider range. It embraces, combines, and considers all circumstances, events, and projects, foreign or domestic, that

> can affect the national interests. Legal discretion has not the means of ascertaining the grounds on which political discretion may have proceeded. It seems admitted that necessity might justify the acts in question. But how shall legal discussion determine that political discretion, surveying the vast concerns committed to its trust, and the movements of conflicting nations, has not perceived such necessity to exist? Considerations of this nature have induced a doubt of the competency or constitutional authority of the court to decide an act invalid in a case of this description.

As the two prohibitions in the commodity clause were not, if literally construed, sustained by any reasonable cause for their enactment, and such construction would result in absolutely destroying the coal so produced by preventing its transportation to market, the court adopted another construction, which it regarded as consistent with the two remaining prohibitions, *and gave effect to the statute.*

It will be observed, and it is very important in applying the case to the one at bar, that the railroad companies were prohibited from carrying on in the future *a legitimate business authorized by their charters*—transporting coal owned by them—and were thereby deprived of a clear property right, and it was held that the regulation was a constitutional exercise of the regulating power of Congress over that commerce. The movement of the coal was interstate. It was, therefore, a subject exclusively within the

jurisdiction of Congress, and in making a regulation concerning the carriage of such commerce Congress could determine, and did determine, that it should not be carried by the owner—that the agent of that commerce should be dissociated from the ownership—the reason for the regulation being that the combination of the business of mining, buying, and selling with transportation, tended to create undue discrimination against other shippers of coal. The fact that the deprivation of property rights in that case were great and grave did not prevent the court from holding, as it has always held, that the statute in this particular was constitutional. The court said:

> The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think, is apparent, and if reference to authority to so demonstrate is necessary it is afforded by a consideration of the ruling in the *New Haven case*, to which we have previously referred. We do not say this upon the assumption that by the grant of power to regulate commerce the authority of the Government of the United States has been unduly limited on the one hand and inordinately extended on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities or to destroy the governmental power of the States

as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all preexisting rights of the railroad companies were subordinated. (*Armour Packing Co.* v. *United States*, 209 U. S., 56.)

We think it unnecessary to consider at length the contentions based upon the due-process clause of the fifth amendment. In form of statement those contentions apparently rest *upon the ruinous consequences* which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause interpreted as the Government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that *these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation.* * * *

U. S. v. *D. & H. R. Co.*, 213, U. S., 266, 415, 416.

This case is conclusive authority for our contentions in the case at bar. In designating the commerce to be regulated by the Lodge amendment, there is no limitation. It covers "*the transportation of oil*

* * * *by means of pipe lines.*" It applies to *all transportation by pipe lines;* that is, all movement of oil for commercial purposes through pipe lines and over State lines. There is no limitation as to the persons or corporations that may be engaged as agents of such commerce. The statute plainly says: "That the provisions of this act shall apply to *any* corporation or *any* person or persons" so engaged, and here the court may not import into the statute any words of limitation. Congress has written in plain and unequivocal language that the regulation shall apply to *any* corporation or person and to *all* movement of oil through pipe lines. The act nowhere attempts to prohibit the transportation of oil. Oil owned by the agents of transportation may be carried. The only prohibition is that the transportation *by pipe lines* shall be carried on by common carriers under the act. This prohibition is in no sense greater or broader or more destructive of private business than was the commodity clause as construed and sustained by this court. Under that act the carrier can not transport coal owned by it at the time of transportation; in this act a private person or corporation can not transport oil *by pipe lines.* In the former case the moving cause of the legislation was to prevent undue discrimination and preferences among shippers; in the present case the moving cause of the legislation was to prevent a monopoly in crude oil. This restriction is applied only to *pipe lines;* all other instrumentalities are un-

affected. The reason for the legislation is a proper one; it is as broad and as important a reason for regulation as is the prevention of discrimination and preferences. In fact, both reasons rest upon the same basic principle. Whether the popular prejudice against this monopoly in oil is well grounded the court may not inquire; that it was at the time of this legislation general and widespread no one will deny, and the words of the Supreme Court in *Pearsall* v. *Great Northern Railway Company, supra,* heretofore quoted, are appropriate:

> We can not say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language.

SUMMARY.

In the final analysis this controversy may be summed up in the following proposition: Congress has power in regulating the interstate movement of oil through pipe lines to declare that it shall be moved only by common carriers under the act; the reason for such regulation is that the movement by private carriers tends to the creation of a monopoly in the commodity; therefore, as said by this court, "the conception that inconvenience, not power, is the

criterion by which to test the constitutionality of the legislation" is "mistaken and baleful."

The decree of the Commerce Court should be reversed and the petitions dismissed.

Respectfully submitted.

CHARLES W. NEEDHAM,
Assistant Solicitor.

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THE PIPE LINE CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES ET AL., APPELLANTS, *v.* THE OHIO OIL CO.	No. 481.
THE UNITED STATES ET AL., APPELLANTS, *v.* STANDARD OIL CO.	No. 482.
THE UNITED STATES ET AL., APPELLANTS, *v.* STANDARD OIL CO. OF LOUISIANA.	No. 483.
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THE UNITED STATES ET AL., APPELLANTS, *v.* THE UNCLE SAM OIL CO.	No. 507.
THE UNITED STATES ET AL., APPELLANTS, *v.* ROBERT D. BENSON ET AL., ETC.	No. 508.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These cases involve the construction and constitutionality of the amendment of 1906 (the so-called

"Pipe Line Amendment," Act of June 29, 1906, 34 Stat. 584) to the first section of the Act to Regulate Commerce, which, in so far as material to this case, is as follows:

> That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, * * * who shall be considered and held to be common carriers within the meaning and purpose of this Act.

The present contentions of the Government are these:

First. The amendment of 1906 applies to all oil-carrying pipe lines engaged in interstate commerce and requires them as a condition to further continuance in that commerce to act as common carriers subject to the Interstate Commerce Commission, and this, whether they had been common carriers prior to 1906 or not. On this point the court below was with the Government.

Second. The amendment so construed is a constitutional exercise of the Federal power to regulate commerce. It is designed and reasonably calculated to prevent the monopolization of interstate commerce in oil. On this point the court below was against the Government; Judge Mack, dissenting.

The cases at bar in all substantial respects are identical. They are appeals from interlocutory decrees of the Commerce Court granting preliminary injunctions against an order entered by the Interstate Commerce Commission which directed these appellee pipe lines and certain others (13 in all) to file with the Commission schedules of their rates and charges for the transportation of oil as required by section 6 of the Act to Regulate Commerce. Some obeyed. The appellees herein did not obey, and brought suit in the Commerce Court for the annulment of the Commission's order. Answers were filed by the United States and the Commission; motions were made for preliminary injunctions; the cases were fully heard; and on March 11, 1913 (the Commission meanwhile having postponed and repostponed the effective date of the order), the court issued its preliminary injunction in favor of the petitioners and appellees.

The injunction was accompanied by two opinions, all of the judges adopting the Government's interpretation of the act, but a majority (3 to 1) holding that as so construed the act was violative of the Fifth Amendment to the Constitution.

These opinions were very full. The court rested its decision upon grounds which completely ended the Government's case. As stated in the majority opinion, it found that—

> Whilst each case differs from the others in various particulars, and perhaps in respects which would be important in other connections, the fundamental questions here in-

> volved are common to them all and arise out of facts which are practically undisputed;

and the majority opinion concludes with the words:

> Without reference to other considerations which might justify preliminary injunctions in these cases, we have purposely placed our decision upon grounds which in effect determine the controversy, and we have done so to avoid occasion for protracted trials and to aid an early review by the court of last resort.

The Government, therefore, has appealed directly from the interlocutory decrees of the Commerce Court, since this court will examine the merits of a preliminary order where it appears that the granting of it was a decision of the whole controversy on the merits. *Int. Com. Commission et al.* v. *B. & O. R. R. Co.*, 225 U. S. 326. (See also the *Sugar Lighterage Case, U. S.* v. *B. & O. R. R. Co.*, 225 U. S. 306, 326.)

Unless otherwise stated, citations in this brief will be to Record No. 481.

THE FACTS.

Of the industry in general it should be observed that the principal crude oil fields in the United States may be described as (1) the Appalachian field, covering parts of the States of New York, Pennsylvania, West Virginia, Kentucky, and Tennessee; (2) the Illinois, Indiana, Ohio field, covering parts of those States; (3) the Mid-continent field, covering parts of the States of Kansas and Oklahoma; and (4) the Gulf field, covering parts of the States of Louisiana

and Texas. There are smaller fields in the States of California, Colorado, Wyoming, Michigan, and Missouri. The last official statistics available showed the total production of crude oil in the United States for the year 1910 as 209,556,048 barrels, of the value of $127,896,328. With few exceptions the refineries are not located in the oil fields but at marketing centers. The crude oil is transported from the fields to the various refineries by the operation of approximately 40,000 miles of pipe lines. The transportation of crude oil by pipe lines has been found so much less expensive than transportation by rail that it may be said that practically no crude oil intended for refining is now transported by rail.

The facts peculiar to the respective appellees may be summarized as follows:

No. 481. The Ohio Oil Company; an Ohio corporation, with a capital stock of $10,000,000; produces and purchases crude oil in the Illinois-Indiana-Ohio and Appalachian fields; transports the same in trunk pipe lines from those fields to Centerbridge, Pa., an unincorporated village of 100 inhabitants, where it is said to make delivery to the Standard Oil Company of New Jersey (R. 2). It has no refineries, and prior to 1906 it owned no pipe lines. For a short distance in the State of Ohio its line is laid on the right of way of the Erie Railroad Company, and for a similar distance in the State of Pennsylvania on the right of way of the Pennsylvania Railroad Company.

Recently its entire capital stock of $10,000,000, with the exception of $150, was owned and controlled by the Standard Oil Company of New Jersey (221 U. S. 1, 73), which now claims to own the delivery end or section of pipe line from Centerbridge, Pa., to New York Harbor. The appellee produces, purchases, and transports crude oil, with the Standard Oil Company of New Jersey as its principal patron.

This company was a party defendant in the Standard Oil Trust prosecution, and by the decree was ordered to be severed from the parent company (221 U. S. p. 71n).

The case is here on the petition, answer, affidavits, and intervening petition of the Cornplanter Refining Company.

No. 482. Standard Oil Company; a New Jersey corporation, with a capital stock of $110,000,000, and with broad charter powers. This company is engaged chiefly in refining oil, but claims to own and operate three pipe lines affected by the order in question, which extend from Unionville, in the State of New York, through New Jersey, to New York Harbor; from Centerbridge, in the State of Pennsylvania, through New Jersey, to New York Harbor, and from Fawn Grove, in the State of Pennsylvania, through the State of Maryland, to the city of Baltimore.

In view of what appears later with reference to the meaning and purpose of the so-called Pipe Line Amendment, the circumstances under which this appellee acquired its pipe lines are most interesting.

Prior to 1906 the appellee had gathered to itself a large number of subsidiary corporations. Among these were National Transit Company, with an authorized capital stock of $25,455,200, of which the Standard Oil Company of New Jersey owned $25,451,650; New York Transit Company, with an authorized capital stock of $5,000,000, all owned by the Standard Oil Company of New Jersey; Standard Oil Company of New York, with an authorized capital stock of $15,000,000, all owned by the Standard Oil Company of New Jersey. The court will recall that later these four companies were held to be parties to an illegal combination and conspiracy for the purpose of monopolizing the purchase, transportation, refining, distribution and sale of crude petroleum and its products, in violation of the Sherman Anti-trust Act; and the ownership of these stocks by the Standard Oil Company of New Jersey, with the resulting power arising therefrom, was likewise held to be illegal. *Standard Oil Co. of New Jersey et al.* v. *U. S.*, 221 U. S. 1.

National Transit Company, a corporation under the laws of the State of New York, in 1906 was and still is a common carrier of oil by means of pipe lines and engaged in interstate commerce as such. The principal line extended from Ohio and Western Pennsylvania to Olean, N. Y., thence eastward to the southern part of that State to Unionville, and thence southeastward through New Jersey to New York Harbor. Another line extended from northwestern Pennsylvania southeastward to Mill-

way, thence to Fawn Grove, Pa., and thence across the State of Maryland to Baltimore. These trunk lines formed a substantial part of the vast system or network of pipe lines in the United States, and through them and their connections crude oil was being transported by the National Transit Company uninterruptedly from the oil fields east of the Mississippi River to New York Harbor and to Baltimore.

New York Transit Company, a second subsidiary of the Standard Oil Company, was organized under the laws of Pennsylvania, and was and is a common carrier of oil by means of pipe lines. In 1904 it took over from the National Transit Company its trunk pipe line from Olean to New York Harbor, and through it transported oil without interruption from Olean, N. Y., through New Jersey, to New York Harbor. It was admittedly engaged in interstate commerce in crude oil by means of its pipe lines conducted in the States of New York and New Jersey, but it did not, nor does it now, refine or purchase crude oil, or transport any oil owned by it.

In 1906 the Standard Oil Company of New Jersey and the Standard Oil Company of New York were engaged in refining crude oil in the States of New York, New Jersey, and Maryland and selling the products thereof. The subsidiary companies, National Transit Company and New York Transit Company, received crude oil at the various fields, transported it to New York Harbor and Baltimore and delivered the same to the Standard Oil Com-

pany of New Jersey and the Standard Oil Company of New York at their refineries.

On the 15th of February, 1905, the House of Representatives adopted a resolution requesting the Secretary of Commerce and Labor to investigate the cause or causes of the low price of crude oil or petroleum in the United States, and the unusually large margins between the price of crude oil or petroleum and the selling price of refined oil and its products, "and to make early report of its findings, according to law, to the end that such information may be used by Congress as a basis for legislation, or by the Department of Justice as a basis for legal proceedings." (Vol. 39, Cong. Rec., Feb. 15, 1905, 2666.) On March 4, 1905, 17 days later, the House of Representatives of the Fifty-eighth Congress adjourned without day.

Eight months elapsed, during which this investigation was actively prosecuted. On the 3d day of November, 1905, the board of directors of the National Transit Company and the New York Transit Company, whose capital stock was owned and whose boards were dominated by the Standard Oil Company of New Jersey, passed resolutions authorizing the alleged sale to the Standard Oil Company of New Jersey of that portion of their respective pipe-line properties extending through the States of New Jersey and Maryland.

The first session of the Fifty-ninth Congress convened on the 4th of December, 1905. It was devoted almost entirely to the consideration of railroad rate regulation and the amendment of the Act to Regulate

Commerce. Simultaneously the Department of Commerce and Labor was continuing the investigation of the oil industry, in pursuance of the resolution.

The Report of the Commissioner of Corporations on the subject of transportation and freight rates in connection with the oil industry was transmitted by the President to Congress; this so-called Pipe Line Amendment was introduced and freely debated, and on the 29th of June, 1906, the amended act to regulate commerce was approved, and by joint resolution August 28, 1906, or 60 days after its approval, was fixed as the day upon which it should take effect.

On July 17, 1906, 18 days after the passage of the act, deeds are said to have been delivered by the National Transit Company and the New York Transit Company, respectively, to the Standard Oil Company of New Jersey, conveying to the latter the sections or ends of these pipe lines in the States of New Jersey and Maryland, and on the 28th of August, 1906, when the act went into effect, the alleged operation of these sections by the Standard Oil Company of New Jersey commenced.

The mere recital of these facts and dates is convincing proof that these conveyances were made with a deliberate purpose to evade, if possible, the legislation foreshadowed by the Report of the Commissioner of Corporations, which had been debated in Congress, and which had been enacted into law before the conveyances were passed.

Unionville is an incorporated village in Orange County, N. Y., with a population of 250; Fawn

Grove is an incorporated village in York County, Pa., with a population of 240; Centerbridge is an unincorporated village in Pennsylvania with a population of 100. No crude oil is produced, purchased (except as claimed by the Standard Oil Co.), sold or refined at Unionville, Centerbridge, or Fawn Grove; and, save for an alleged measurement at those points of the quantity of the oil in transit, the oil flows with practical continuity and the transportation now is substantially as it was before New York Transit Company and National Transit Company conveyed portions of their lines already described to the appellee Standard Oil Company.

It may be further stated that the pipe lines in question were located in part upon or across the rights of way of various railroad companies, upon or across public highways, and that "said pipe lines are and always have been located, maintained, and operated, over public highways or on the rights of way of railroad companies," and "that petitioner's predecessors in title did, at certain points, lay the pipe lines in question along or across public highways and streets in said State," and "that at various points petitioner's pipe lines are laid and are being operated upon, along, or across the rights of way of railroad companies engaged in interstate commerce." (No. 482; R. 86–88.) In its answer the United States alleges that the predecessor in title of petitioner did, for long distances, lay said pipe line in, along, and across certain of the navigable rivers of the United States, including the Hudson River, any private use

whereof is contrary to the public policy of the United States. (No. 482; R. 35.) Petitioner does not deny that its pipe was so laid, though it does deny that what it did in that behalf is contrary to the public policy of the United States.

The case is here on petition, answer, affidavits and certain stipulated facts.

No. 483. Standard Oil Company of Louisiana; a Louisiana corporation, with a capital stock of $5,000,000 and broad charter powers (R. 12). It produces crude oil in the Caddo field in Louisiana and purchases crude oil produced in the Mid-continent field in the States of Kansas and Oklahoma, which is brought by a pipe line, continuous in effect if not in name, from the Mid-continent field to the refinery of petitioner at Baton Rouge.

The Prairie Oil & Gas Company owns and operates a portion of this trunk pipe line which is located in the Mid-continent field in the States of Kansas and Oklahoma (R. 28). Oklahoma Pipe Line Company is a corporation organized under the laws of the State of Oklahoma as a common carrier of crude oil with the power of eminent domain. It owns the section of this trunk line which extends from a point in Oklahoma called Creek, in the south central part of the Mid-continent field, to McCurtain, a town in southeastern Oklahoma at or near the Arkansas line. At this point The Prairie Oil & Gas Company again resumes the ownership of the pipe line to and through the State of Arkansas to Ida, in the extreme northwestern part of Louisiana, where the appellee com-

mences its ownership. Thus it appears that while the pipe line is practically continuous from the Mid-continent field to Baton Rouge, it is owned by sections, according to the States which it traverses. Physically it is a continuous transportation, although conducted under different titles.

Ida, like the villages of Unionville, Centerbridge, and Fawn Grove, is not a place where oil is refined, but is simply a pumping station on this through line from the Mid-continent field to Baton Rouge. It is unincorporated, with a population approximating 200 (R. 59, 60). The section from Ida to Baton Rouge is about 266 miles in length and is useless for transporting oil from the Mid-continent field to Baton Rouge unless operated jointly with the remaining sections of the through line. This pipe line also at various points crosses public highways and crosses and is laid upon the right of way of railroad companies. The Oklahoma Pipe Line Company, which operates that portion of the line heretofore described, filed no petition to set aside the order of the Commission directing it to publish and file tariffs, and, as to it, the order is in full force and effect.

The case is here on petition, answer, affidavits, and certain stipulated facts.

No. 506. The Prairie Oil & Gas Company; a Kansas corporation, organized in 1904, with a capital stock of $300,000, which was increased from time to time and is now $20,000,000, of which $18,000,000 has been issued and sold (R. 3). It produces and purchases crude oil in the Mid-continent field and transports the

same from that field in a 12-inch trunk line to Griffith, Ind., near the town of Whiting, where the refineries of the Standard Oil Company of Indiana are located. It also has a line in the States of Oklahoma, Arkansas, and Louisiana, connecting in the manner hereinbefore described with the lines of the Oklahoma Pipe Line Company and the Standard Oil Company of Louisiana. Its line to Griffith, Ind., is the only pipe line extending from the Mid-continent field eastward. This is laid in part over the right of way of the Atchison, Topeka & Santa Fe Railway Company from Sibley, Mo., to Joliet, Ill., a distance of about 500 miles (No. 506; R. 32, 33), and portions of the company's lines are laid over the public domain in the Indian Territory and Oklahoma (No. 506; R. 41 to 61, inclusive). The Mid-continent field now yields approximately one-fourth of the total production of crude oil in the United States. The Prairie Oil and Gas Company owns some 1,833 producing oil wells in this field, with an aggregate output approximating 11,557 barrels per day. It purchases about 70,000 barrels per day and claims to have a market and outstanding contracts for the delivery of 100,000 barrels per day. It has accumulated in storage and now holds more than 40,000,000 barrels—almost the total annual output of the entire field.

It is interesting to note that while others of these appellees protest against becoming common carriers because it would lead to confusion of grades in their pipes when carrying diverse grades of oil, The Prairie Oil & Gas Company protests on the ground that it

is designedly mingling in its pipes various grades of oil and does not desire to refrain from so doing.

While the line of The Prairie Oil & Gas Company ends at Griffith, Ind., it claims to have been able by shipment over common-carrier lines east of that point to establish a trade for its Mid-continent oil in the States of Indiana, New York, Pennsylvania and New Jersey.

Until December, 1911, the entire capital stock of The Prairie Oil & Gas Company was owned by the National Transit Company of New York, a subsidiary corporation of the Standard Oil Company of New Jersey. The Standard Oil Company of New Jersey also owned and controlled the entire capital stock of the Standard Oil Company of Indiana, which was and is the principal patron of the Prairie Oil & Gas Company. These several companies were held in *Standard Oil Company of New Jersey* v. *United States*, 221 U. S. 1, to be parties to an illegal combination and conspiracy for the purpose of monopolizing the purchase, transportation, refining, distribution, and sale of crude petroleum and its products, in violation of the Sherman Act.

The case is here on petition, affidavits, answer of the Interstate Commerce Commission, and motion by the United States to dismiss the petition.

No. 507. The Uncle Sam Oil Company; a corporation organized in 1905 under the laws of the Territory of Arizona, with power, *inter alia*, to transport crude oil by means of pipe lines. It is a foreign corporation transacting business in Oklahoma and Kansas. It

produces and purchases crude oil in the Mid-continent field, particularly in Oklahoma, and transports the same by pipe lines to Cherryvale, Kans., where it owns and operates a refinery (R. 18). Its facilities are located and its business is carried on entirely within the Mid-continent field.

A part of its pipe line is laid for a distance of 25 miles over the public domain in the Indian Territory. The Government insists that this was done under regulations prescribed by the Secretary of the Interior, providing that every pipe line so laid shall be held to be a common carrier (R. 43-45). The appellee, however, avers that it was not aware of these regulations and did not intend to assent to the same. The laws of Kansas and Oklahoma (see Appendix) impress upon oil-carrying pipe lines the character of common carriers.

The case is here on petition, answer and affidavits.

No. 508. Robert D. Benson et al., doing business as the Tidewater Pipe Company, Limited, is a limited co-partnership under the laws of Pennsylvania, with a capital stock of $625,000 (R. 7). It produces and purchases crude oil in the Indiana-Illinois-Ohio and Appalachian fields and transports the same by pipe lines from those fields to Bayonne, N. J., on New York Harbor, where it makes delivery to the Tidewater Oil Company, a New Jersey corporation, with a capital stock of $19,967,000, its sole patron with refineries at Bayonne.

The partners in the Tidewater Pipe Company are large owners of the stock of the Tidewater Oil Com-

pany. The Standard Oil Company of New Jersey is, or was until quite recently, also the owner of a part of the capital stock of that company. The trunk lines in question are 6 inches in diameter. The first was built in 1878–79, from Rixford, Pa., to Williamsport, Pa. In 1884 the line was extended to Tamanend, Pa., and in 1888 to Bayonne. Another trunk line extends from Stoy, Crawford County, Ill., through the States of Illinois, Indiana, Ohio, and Pennsylvania, to Rixford.

It is alleged in the answer of the United States that the appellee has "for long distances—the exact distances this respondent is unable at this time to state—laid its said lines along the streets of the municipalities and the public highways of the various counties and States through which the pipe lines run" (No. 508; R. 8); and this is not denied by the petitioner.

The case is here on petition, answer, affidavits, and intervening petition of the Wellsville Refining Company.

SPECIFICATION OF ERRORS.

The assignments of error upon the part of the appellant may be found in the several records, as follows:

No. 481, p. 148; No. 482, p. 94; No. 483, p. 91; No. 506, p. 71; No. 507, p. 57; No. 508, p. 57. It is not necessary to repeat or summarize them here. There are some slight variances, brought about by diverse facts; the assignments are similar in substance, however, and present in varying phases the crucial question—*the constitutionality vel non of the Pipe Line Amendment of 1906.*

THE ARGUMENT.

FIRST POINT.

THE CONSTRUCTION OF THE ACT.

Congress deliberately intended the act to apply to every interstate pipe line. It intended to compel every interstate pipe line to become a common carrier as a condition precedent to engaging in interstate commerce. Whether any particular pipe line had or had not been a common carrier prior to the passage of the act is wholly immaterial.

Both the Commerce Court and the Interstate Commerce Commission agreed in adopting this construction of the act.

The Commerce Court said (No. 481; R. 105):

> In short, we agree with the Commission in what is said in the following excerpts from its report in the pipe line proceeding:
>
> "This seems to be the plain meaning of the act, that all pipe lines, carrying oil from one State to another State, no matter what their previous status, should be thenceforward considered and deemed to be common carriers. And to uphold this construction, reference may be made to the history of this provision. * * *
>
> "Throughout the discussion there is abundant evidence that Congress passed this act for the purpose of subjecting all interstate pipe lines carrying oil to Federal regulation, and took this action consciously, in the presence of the very constitutional question now raised as to its power."

The Pipe Line Amendment, Act of June 29, 1906, 34 Stat. 584, added to the first section of the Act to Regulate Commerce the words italicized below:

> That the provisions of this act shall apply to *any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water,* * * * *who shall be considered and held to be common carriers within the meaning and purpose of this Act.*[1]

I. The legislative history of the act demonstrates its intent.

To ascertain the evils at which the act was aimed its legislative history, the amendments that were offered and rejected during its passage, and the general history of the times, we may with propriety consult the debates in Congress attending its enactment.

Jennison v. *Kirk*, 98 U. S. 453, 459.

Holy Trinity Church v. *U. S.*, 143 U. S. 457, 465.

Am. Net etc. Co. v. *Worthington*, 141 U. S. 468, 473.

Binns v. *U. S.*, 194 U. S. 486, 495, 496.

Blake v. *National Bank*, 23 Wall. 307, 319.

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[1] As originally enacted this passage read consecutively, without the clause indicated by asterisks. This clause was inserted by the act of June 18, 1910, 36 Stat. 539, 544, and is as follows: "and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country."

Such an examination in the present instance renders it indisputably clear that the evil aimed at was the monopoly of the oil business by the Standard Oil Company, a monopoly largely, if not chiefly, due to the ownership or control by that corporation of 90% of the pipe lines, and the unconscionable manner in which that corporation had asserted against the independent well owners the advantage resulting therefrom. The exact connection between private pipe lines and monopoly will be more fully discussed hereafter, but for the purpose of finding out what Congress meant by the legislation in question, which is all we are discussing at this point, we are interested only in the fact that Congress undoubtedly believed that such connection did in fact exist, and that the only practicable means of eradicating the evil was to prohibit interstate traffic in oil by means of pipe lines except upon condition that the pipe line owners should act as common carriers.

The scheme of railroad legislation contained in the Hepburn Act of 1906 did not, as originally proposed, have any reference to pipe lines. Congress had, however, at an earlier date directed the Bureau of Corporations to enter into an extensive investigation on the subject of the transportation of petroleum. On May 4, 1906, while the debate upon the Hepburn Act was in full progress in the Senate, the Commissioner's report was transmitted to Congress. The gist of the report is contained in the following sentences:

> Chief among the advantages which, aside from present railroad discriminations, the

> Standard possesses are the immense pipe line systems of the Company * * *.
>
> The Standard Oil Company has all but a monopoly of the pipe lines in the United States. Its control of them is one of the chief sources of its power. (59th Cong., 1st Sess., House Doc. 812, pp. 29, 37.)

The report was transmitted to Congress by the President, accompanied by a message urging immediate action. (40 Cong. Rec. 6358.)

Hardly had this report and message been received when Senator Lodge arose and offered practically in its present form (the differences being immaterial here) the amendment concerning pipe lines. (40 Cong. Rec. 6361.) Senator Foraker immediately objected to Senator Lodge's amendment *on the ground that it was not restricted to pipe lines which were already common carriers, saying:*

> Mr. President, I do not want to make any opposition to the Senator's amendment, but it occurs to me that *the amendment ought to be further amended, so as to provide that it shall apply only to pipe lines operated for the public.* I do not understand how you would compel a man who has a private pipe line of his own to become a common carrier. * * * I think such a limitation ought to be put in the Senator's amendment by an amendment to the amendment that it shall apply to all pipe lines that are carrying for the public, and not to private lines that an individual or a single corporation may have laid down and put into operation for its own benefit. (40 Cong. Rec. 6361.)

Senator Nelson replied:

> In reference to the amendment suggested by the Senator from Ohio to the amendment of the Senator from Massachusetts, I desire to state that *if that amendment is adopted it will practically nullify the provision, because every one of these pipe lines can say "we refuse to do business for the public."* (40 Cong. Rec. 6365.)

Senator Lodge followed Senator Nelson, saying:

> Mr. President, the purpose of this amendment is to bring the transportation of oil and other commodities within the interstate commerce law. Oil is one of the greatest articles of interstate commerce carried in this country, and it is now absolutely outside and beyond any Government regulation whatever. * * * But the amendment suggested by the Senator from Ohio (Mr. Foraker) to my amendment, to the effect that no pipe line, unless it carries for the public, shall come under this rule, will, as the Senator from Minnesota (Mr. Nelson) says, *absolutely destroy the value of my amendment.* (40 Cong. Rec. 6365.)

As the debate continued the connection between private pipe lines and monopoly was more and more clearly brought out. It was shown that oil must be carried great distances from the wells to refineries and principal markets; that, because of the cost of railroad or other forms of transportation, it is, from a practical point of view, as impossible for an independent producer to market his product without a pipe line as it would be if he had no right of egress

from his lands; that pipe lines are of such enormous length, and hence so enormously expensive, that the construction of individual ones by independent well owners and refiners is out of the question; and that as a result the independent well owner is completely within the power of the owner of the pipe line—a power which had in fact been pitilessly used.

The following excerpts are illustrative:

> Mr. McCUMBER. If they are carrying their own goods and no goods of the public, how is the public interested one way or the other in the matter of their carrying their own goods through their own pipe line from one State to another?
>
> Mr. TILLMAN. Let me answer the Senator from North Dakota in this way: Take West Virginia, whence, I believe, comes the gas in the case mentioned by the Senator from Ohio. Of course that gas is not going down yonder three or four hundred miles without pressure, and therefore it comes from the surrounding country where originally tapped, and the gas company which has bored its wells may be robbing the landowners around it of their gas, because it has great capital and the facilities for sending it off and selling it, while the landowner, who is not able to pipe it to the market, is not allowed to pipe it through the established pipe line, because Congress will not help him. That is my conception of a just and proper reason. (40 Cong. Rec. 6362.)

* * * * *

Senator Lodge said:

* * * * *

There are twenty-eight principal pipe lines in the United States, for the most part trunk lines. There are fourteen local or gathering lines. Twelve of the principal lines are combined in one system under one control, extending from Indian Territory and from Tennessee to the Atlantic seaboard. Five other principal lines form a system under one control, extending from West Virginia and Ohio through the Pennsylvania oil fields to Philadelphia. (*Id.* 6365.)

Now, Mr. President, the oil is brought to the trunk lines through small local feeding and gathering lines, as a rule. *There are practically two great companies* that control pipe lines engaged in interstate commerce. One is the *Standard Oil*, which is said, roughly, to control 90 per cent. I do not know whether that is correct or not. The other is the *Pure Oil. They do not own the wells, and they buy the oil of the well owner*, and the charge for the transportation is taken out of the price, as appears in the copies of the certificates and receipts which I have here.

Those well owners are absolutely at the mercy of the pipe lines. I have had cases brought to me, which in this fifteen-minute debate I can not enlarge upon, where an independent refinery has been deprived of its supply of oil because it would not agree to the prices of the pipe lines. *A small well owner is compelled to take the price that is offered by the controller of the trunk line.*

> This is not a case of a transportation company owning the property, like a railroad owning a coal mine. *It is exactly like a railroad buying the coal of a coal miner and transporting it.* * * * The pipe line companies buy the oil they use in their own refineries and *owing to the fact that they buy the oil, if you put in the words "carry for the public," the pipe lines go right out from under this amendment* in my judgment. * * * It is simply to give relief, if relief is sought, to those who find that they are *not fairly treated* * * * *by the pipe lines through which alone, practically, they can get their commodity to market.* (40 Cong. Rec. p. 6366.)

Excerpt from a letter inserted into the Record by Senator Lodge as part of his speech:

> I am a producer of petroleum in West Virginia and a refiner of petroleum in New York Harbor, and have considerable trouble in procuring a quantity of crude oil sufficient to run our works.
>
> I feel aggrieved at the treatment by the Standard Oil Company, owner of the pipe lines, and the Pure Oil Company, controller of other pipe lines that run in that field. Both companies refuse to deliver to me the oil I produce, and I have to sell it to both at the prices they make.
>
> I understand you are now trying to frame some bill that will put the people on an equality; it would be well for you to know the condition of the business and how both companies have created and keep a monopoly in the business.

9715—13——3

Eureka Pipe Line.—This company is owned by the Standard Oil Company. It passes through Ohio and West Virginia. It receives into its line oil that is produced on a lease I own in Wetzel County, W. Va. It takes this oil to United Pipe or National Transit Lines and is pumped through that system to Jersey City.

I have made application to the Standard Oil Company for transportation of my oil and offered to pay them the usual gathering and transportation charges. They refuse to deliver me my own oil and I have to sell it to them at their price, although I am ready to pay a premium of 10 or 20 cents a barrel over the market price and the current transportation rates.

They claim that the "Eureka Pipe Lines" is not a public carrier; that it is a private concern, and is not subject to the laws that regulate public carriers. The National Transit Line is a public carrier, but on account of the receiving or initial lines being a private concern, they need not take the oil and are not amenable to the law as public carriers are.

* * * * *

The object of this letter is to show the condition of pipe lines that are owned by private parties or copartnerships and not common carriers that work in connection with other lines that are common carriers.

In my opinion all pipe lines should be common carriers, and any producer of oil *anywhere* should be at liberty to sell the certificates of their oil to anyone wishing to purchase them

and the oil should be received and delivered to all on equal conditions. This would create an open market and the producers could get all that their product was worth.

Common carriers.—They refuse to deliver the oil to refiners where they want it, and generally deliver it in some out-of-the-way place that will cost more to take it from the point of delivery than it can be brought by rail from the point of production.

Difference in cost between rail and pipe-line rates.—Oil can be handled by pipe lines at about one-tenth what it will cost by rail.

The oil monopolies owning pipe lines generally make the outside public do their business by rail, they, through influence making rail rates while they do their business by pipe lines.

Marketing crude petroleum.—On account of the interest controlling pipe lines, viz, *Standard Oil Company* and *Pure Oil Company*, refusing to receive oil for transportation and deliver it to the owners of the oil, it prohibits an open market for crude petroleum. The producer has to sell it to the Standard Oil Company or its agents at the *Standard Oil Company's price*, and to the Pure Oil Company or the Producers and Refiners' Line (which is owned by the Pure Oil Company) *at their price*, although the owners of the oil stand ready, and in my case *I have offered a premium of 10 cents per barrel* plus all transportation and charges for my oil. (40 Cong. Rec. 6368.) (Italics theirs.)

Senator Lodge's amendment passed precisely as offered so far as our purposes are concerned. It

was later twice reconsidered, with the same result. For the first reconsideration, see 40 Cong. Rec. 6895, 6896, 6900; for the second, see 40 Cong. Rec. 6999. Again, Senator Foraker bitterly objected to the amendment in a speech, the keynote of which is the following sentence:

> * * * I say you have no right to make a common carrier out of a private individual who is transporting for his own particular business and has no thought or purpose of accommodating the public * * *. The way to remedy this is * * * by adding, after the word "transportation," as I suggested to the Senator from Massachusetts when he offered it, the words "*for the public.*" (40 Cong. Rec. 6999.)

The following dialogue took place between him and Senator Culberson:

> Mr. CULBERSON. *I ask the Senator if his purpose is not carried out in the phrase beginning at line 3, page 2, "who shall be considered and held to be common carriers within the meaning and purpose of this act,"* because in the case he mentions the company will not be a common carrier when only carrying gas for itself, and it will not be brought within the meaning of this act according to its own provision?
>
> Mr. FORAKER. *I have not heard of anybody putting that interpretation on that language.* I called attention to it when the matter was under consideration a few days ago, and a different view was taken of it. It does not make it very clear, but if you were to put in

the words "for the public," after "transportation," then there could not be any question about it, and I can not understand why that should be objected to. If there is anybody transporting in a pipe line any commodity, no matter what it may be, for the public——
(40 Cong. Rec. 7000.)

Senator Foraker's proposition was rejected after Senator Lodge had again explained its purpose as follows:

* * * *If you put in the words "transportation for hire" or "transportation for the public" you absolutely destroy this amendment* so far as its effectiveness is concerned. The method of getting the oil is, as a rule, that the Standard Oil Company or the Pure Oil Company, which are the two great carriers of oil, *buy it of the well owner* and carry it, and they would immediately say they were not carrying for the public; that they were carrying for themselves. That is the reason why the word "public" or "transportation for hire" put in there would immediately wreck this amendment.

My object, I state frankly, in this amendment is to bring the pipe lines of the Standard Oil Company within the jurisdiction of the Interstate Commerce Commission. I do not see why that great corporation, with its enormous traffic in this article, should alone be exempted from the supervision and regulation of the Government. I care very little about the natural-gas feature in the amendment, but I do want to bring the Standard Oil Company somewhere within the reach of the law, and,

> owing to the method in which most oil is bought and handled, *if you put in the words "for the public" after "transportation" you practically kill the amendment.* (40 Cong. Rec. 7000.)

For further debate relevant to the application of the amendment to private pipe lines see 40 Cong. Rec. 7002, 7005, 7008, 7009.

Its meaning being clear, the question of its constitutionality arose, and was defended by Senator Nelson (40 Cong. Rec. 7001), and again by Representative Rhinock (40 Cong. Rec. 9337). That Congress clearly appreciated the existence of the constitutional question is further indicated by the following excerpts:

> Mr. LONG. *This bill makes all pipe lines common carriers, without any exception.*
>
> Mr. MALLORY. *Yes; this bill says that*, but this bill can not make a common carrier out of a line that is not a common carrier.
>
> Mr. LONG. *That will be for the courts to determine* (p. 9254).
>
> Mr. FORAKER. A majority of the Senate insisted that this provision should apply, as the Senator from Massachusetts contended it should, to all pipe lines, *without regard to whether they were carrying for the public or not*, his contention being that such a qualification would destroy the effect of what he was trying to accomplish (p. 9255).
>
> Mr. LONG. But *the intention of this amendment*, as the Senator will admit, *is to take in all pipe lines. There are no exceptions*, and it

> will take a decision of the courts to determine whether the Senator and myself are right in that proposition (p. 9256).

Some one suggested that the amendment had been adopted in confusion without any sufficient comprehension, but Senator Gallinger answered as follows:

> It will be noted on page 6504 that on the amendment proposed by the Senator from Massachusetts as amended there was a roll call and there were seventy-five Senators who responded to their names. So it is perfectly apparent that the Senate perfectly understood what it was doing with reference to this matter. (40 Cong. Rec. 7001.)

The act as amended went twice to conference. The first committee altered the position of the amendment, putting it in the same section with the commodities clause, which at that time covered all common carriers. In this position it would not only have applied to all pipe lines, but would have had the further effect of divorcing the ownership of pipe lines and the ownership of oil. This, however, was disagreed to. The second report restored the amendment to its original position and in the commodities clause substituted for the words "common carrier" the word "railroad." This was accepted, but not without strenuous opposition from certain Senators. Senator Tillman, a member of the first conference committee, summarizes the situation as follows:

> * * * it simply means in plain English that the Standard Oil Company has got in its

> work * * *. We release the Standard Oil people entirely from the control of the provision which divorces the producers of commodities from the transportation of commodities—— (40 Cong. Rec. 9101).

As all this discussion was directed at the Standard Oil Company, and as both the report of the Commissioner of Corporations and the debates in the Senate had already made clear that the Standard Oil Company, as to the main part of these lines at least, had never held itself out as a common carrier, there can be no doubt that Congress meant the act to apply irrespective of the pipe lines' previous history. Senator Lodge said:

> I think under this clause as it now stands, these trunk lines, which are practically 90 per cent in the control of the Standard Oil, may be compelled to take the oil of other producers. (40 Cong. Rec. 9104.)

The original discussion as to the exact application of Senator Lodge's amendment was renewed in connection with this conference report, but only served as an opportunity for Senators Culberson, Bailey, and Lodge to reiterate the meaning for which the Government contends. (40 Cong. Rec. 9103, 9104, 9644–9647.)

II. The language of the amendment is appropriate to express the intention of Congress manifested by the debates.

(1) The petitioners contended below, that whatever Congress may have intended when the amendment was enacted, nevertheless, the language itself

is susceptible of a construction that would confine it solely to those companies (comparatively few) which were common carriers prior to 1906. In support of this position, the primary and normal meaning of the words "engaged in the transportation of oil" was argued to be, "engaged in *the business of* transporting oil *for the public for hire.*" The short answer is, that the petitioners are urging the court not to construe the statute, but to rewrite it, and to insert words never there,—the very words, in fact, deliberately rejected by Congress when Senator Foraker tried to amend the carefully chosen language of Senator Lodge. Obviously such a position is untenable, and so the Commerce Court decided. (No. 481; R. 100.)

(2) It was further urged that the concluding clause of the amendment, "* * * *who shall be considered and held to be common carriers within the meaning and purpose of this act*" is merely descriptive, not mandatory, and confines the operation of the preceding language to those lines which may be held to have been common carriers all along. Clearly such an argument substitutes a strained and artificial meaning for the normal and primary meaning of the words. Clearly the clause is mandatory; it is the very formula most frequently used in statutes where it is desired to include something which would not ordinarily be connoted by the words themselves. It is immaterial, says Congress, whether these pipe lines are common carriers in fact; they shall in any case be *considered* common

carriers for "*the purpose of this act.*" The instances where these or similar words have been used to express a mandatory intention are innumerable. The following are a few:

Act to Regulate Commerce, sec. 6:

> Whenever the word "carrier" occurs in this act *it shall be held* to mean "common carrier."

Cardinel v. *Smith*, 5 Fed. Cas., No. 2395:

> When an act (14 Stat. 144) declares that dealers in canned goods, under certain circumstances, "*shall be deemed* the manufacturers thereof," it is equivalent to declaring that such dealers shall be treated and held liable as if they were manufacturers, notwithstanding they are not such in fact. (Syllabus.)

Revised Statutes, sec. 2172:

> The children of persons who have been duly naturalized * * * *shall*, if dwelling with their parents, *be considered* as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, *shall* though born out of the limits of jurisdiction of the United States, *be considered* as citizens thereof; * * *

36 Stat. 96, sec. 7:

> * * * and if the appraised value of any merchandise shall exceed the value declared in the entry by more than seventy-five per centum * * * such entry *shall be held* to be presumptively fraudulent * * *.

36 Stat. 89, sec. 23:

> * * * but this privilege *shall not be held* to apply to implements, machinery, or apparatus to be used in the construction of any bonded warehouse * * *.

36 Stat. 103, sec. 25:

> * * * and evidence of such giving, or offering, or promising to give, satisfactory to the court in which such trial is had, *shall be regarded* as prima-facie evidence * * *.

Revised Statutes, sec. 2174:

> * * * and every seaman, being a foreigner, *shall*, after his declaration of intention to become a citizen of the United States * * * *be deemed* a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, * * *.

The Pure Food Law, 34 Stat. 768:

> SEC. 7. That for *the purposes of this act* an article *shall be deemed to be* adulterated * * * in the case of foods * * * when * * *, etc.,

giving many instances where the condition termed adulterated could not possibly be regarded as such within any ordinary use of the word.

> SEC. 12. * * * The word "person" as used in this act *shall be construed to import* both the plural and the singular, as the case demands, and *shall include* corporations, companies, societies, and associations. When construing and enforcing the provisions of this

act, the act * * * *shall in every case be also deemed to be* the act, etc. * * *.

Revised Statutes, sec. 1:

* * * a requirement of an "oath" *shall be deemed* complied with by making affirmation in judicial form.

Revised Statutes, sec. 5:

The word "company" or "association" when used in reference to a corporation, *shall be deemed* to embrace the words "successors and assigns of such company or association," in like manner as if these words, or words of similar import, were expressed.

Colorado R. S., 1908, sec. 2439:

Any such corporation or corporations * * * *shall be deemed a common carrier* * * *.

Oklahoma constitution, Art. IX, sec. 34:

As used in this article the term "transportation company" shall include * * *; the term "rate" *shall be construed to mean* * * * etc.

Missouri R. S., 1899, sec. 4160:

* * * seventeenth, * * * the place where any person having no family shall generally lodge, *shall be deemed* the place of his residence.

See also Revised Statutes, secs. 2162, 1770, 1771, 1772, 1782, 1787, 1788, 1789.

Many of these examples, it is true, use the words "shall be deemed to be" or "shall be construed to be," but clearly there is no essential difference

between such expressions and the words "shall be considered and held to be." To the normal user of English the latter is as appropriate to express the meaning which the legislature intended to convey as are the former. It would be a most artificial construction which should attempt to distinguish between them.

(3) In conclusion, attention is asked to the fact that while the act in terms refers to "common carriers by railroad" (sec. 1), Congress studiously and significantly avoided the use of any such phrase, as "common carriers by pipe line" or "common carrier pipe lines."

III. The rule of construction followed in the "Commodities Case," 213 U. S. 366, is not applicable here.

The following excerpts from the opinion of the Court below follow and accurately set forth the Government's position on this point (No. 481; R. 101–104):

> These considerations are sought to be fortified by invoking the familiar principle that where a statute permits of two constructions, one of which involves serious questions of constitutional power and right, while the other would be free from constitutional objection, the latter should be adopted. Numerous cases illustrating and enforcing this principle are brought to our attention, of which one of the latest is the well known "Commodities Case," *United*

States v. *Delaware & Hudson Company*, 213 U. S. 366. Upon these authorities the contention is earnestly pressed that the amendment should be held to apply to only such pipe-line companies as are or may be adjudged to be common carriers, because the broader construction upon which the Government insists, and which would in effect extend the amendment without limitation or qualification to all persons and corporations engaged in the interstate transportation of oil by means of pipe lines, including those who use this means solely for transporting their own oil over their privately acquired rights of way, necessarily gives rise to "grave and doubtful constitutional questions," 213 U. S., supra, and perhaps to "a succession of constitutional doubts," as was suggested in the *Harriman case*, 211 U. S. 422.

That the argument thus summarized is not without force may be conceded. *The objection to its acceptance does not arise from any doubt concerning the rule of interpretation invoked, for that rule is well settled, but rather from the lack of any substantial basis for its application. It is only when a statute is ambiguous or obscure, or wanting in definiteness, so that its real intent and meaning are uncertain because the language permits differing interpretations, that the rule in question may be applied.* If the legislation is clearly expressed and of unmistakable import, so that there is no room for reasonable doubt as to what the lawmaking body intended to accomplish, the

courts are not at liberty to frustrate or modify the legislative intention, but must accept and deal with the statute in accordance with the manifest purpose which it expresses.

To our apprehension the meaning of this amendment is not open to serious question. It is a clear and comprehensive declaration, in no respect indefinite or incomplete. The concluding phrase is not a limitation or restriction, but on the contrary was plainly inserted for the purpose of fixing the legal status of the persons and corporations included in precise terms in the preceding description, to the end that they should be regarded and treated as common carriers subject to the act by all officials who are or may be charged with the administration and enforcement of the regulating statute. In our judgment the amendment permits of no other or different construction, and we must therefore accept it as a plain and unambiguous measure, designed to effect a complete and definite purpose.

In support of this view we need cite only the first "*Employers' Liability cases*," 207 U. S. 463, 500. It seems evident to us that the statute then under consideration was not clearer or plainer than is the amendment in question, nor were its terms any more comprehensive and unqualified. To uphold the constitutionality of that enactment the Government stoutly contended that it should not be construed as applying to all the employees of any common carrier engaged in interstate commerce, although all were included in the

language defining its scope, but should be held to embrace only such employees as were, or when they were, themselves engaged in interstate commerce; and this view is reflected in the dissenting opinion of Mr. Justice Moody. But a majority of the court, speaking through Mr. Justice (now Chief Justice) White, rejected the argument in an opinion from which the following is quoted:

"So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employee,' as found in the statute, should be held to mean any employee when such employee is engaged only in interstate commerce; but this would require us to write into the statute words of limitation and restriction not found in it. * * * To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; * * *

"The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional; but this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose."

SECOND POINT.

THE CONSTITUTIONALITY OF THE ACT.

The act construed as applying to all interstate oil-carrying pipe lines and making it a condition upon their operation that they shall act as common carriers does not violate the Fifth Amendment to the Constitution.

Upon this inquiry the court below defined its province in the language of *Minnesota* v. *Barber*, 136 U. S. 313, 320, as follows:

> * * * Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States.

And referred also to *C. B. & Q. Ry.* v. *Drainage Commrs.*, 200 U. S. 561, 593, in which it was said:

> * * * If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. * * * If the injury complained of is only incidental to the legitimate exercise

> of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution.

We submit to the test adopted by the court below and with reference to the act under discussion maintain that:

(1) The object of the act is one for which the Federal authority may properly be exercised.

(2) The means employed have in fact a real and substantial relation to the object sought, and are reasonable in themselves, and not arbitrary or beyond the necessities of the case.

(3) The act is therefore valid, for it does not violate any express prohibition of the Constitution.

Or, to paraphrase the classic statement of the Chief Justice in *McCulloch* v. *Maryland*, 4 Wheat. 421, the end is legitimate and within the scope of the Constitution, the means are appropriate, are plainly adapted to that end, are not prohibited, and consist with the letter and spirit of the Constitution.

I. The object of the Pipe Line Amendment, namely, to regulate interstate commerce in oil by protecting well owners and independent refiners from duress by pipe-line owners, rendering possible real competition, and preventing monopoly of the interstate commerce in oil, is one for which the authority of Congress may properly be exercised.

The purpose of the act was the prevention of monopoly. This has been fully shown in the preceding point.

It is clear that Congress recognized the economic advantage possessed by the pipe-line owner whereby he was able to oppress unreasonably the small well owner and refiner, and to draw into his own hands at his own terms the entire crude output in the region tributary to his line and the consequent control of the industry. The *Report of the Commissioner of Corporations* declared this to be one of the "chief sources" of the power of the Standard Oil Company (59th Cong., 1st Sess., House Doc. 812, p. 37), a "natural advantage due to its enormous capital" (p. 62).

Clearly, whatever we may think of the *means* chosen, the *purpose* was legitimately within the field of legislative power. The Government may always intervene to prevent an economic advantage from being made the instrument of oppression. There is no inalienable right to do injustice.

Competition is the basis of our economic policy. But not war to the knife and the knife to the hilt. The whole history of remedial legislation is the history of checks invented by society to prevent the stronger, richer, or more crafty from wringing from their fellow men advantages unreasonably disproportionate to their own superiority.

The prevention of monopoly by the prohibition of business methods which tend to produce it is only one example of this principle. (*Standard Oil Co.* v. *United States*, 221 U. S. 1; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 109; and see the very strong recent case upholding statutes against local

price cutting, *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.) The regulation of public service companies is another. (*Wyman, Public Service Corporations*, Chap. III.)

But the principle has an infinitely wider application. As was well said by Mr. Justice Holmes in *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 271:

> Courts and legislation sometimes have recognized that the so-called freedom to contract or not may be made illusory by the economic situation of one of the parties.

Thus manufacturers may be compelled to pay weekly wages because any other system tends to give the employer, by reason of his economic position, an unfair advantage over his employees. (*Opinion of the Justices*, 163 Mass. 589.)

Laws compelling the payment of wages in cash, instead of company store orders (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13), and laws forbidding the payment of seamen's wages in advance (*Patterson* v. *Bark Eudora*, 190 U. S. 169), stand upon the same basis, and so do Employer's Liability Acts (*Second Employer's Liability Cases*, 223 U. S. 1), and loan-shark laws (*Mutual Loan Co.* v. *Martell*, 222 U. S. 225).

Doubtless there were those who complained that property rights and freedom of contract were unduly restricted when men were first forbidden to sell themselves as debtor slaves, yet only recently laws carrying the same idea two steps beyond, and forbidding

women, and even men, to hire themselves to excessive daily labor have been sustained by this court. *Muller* v. *Oregon*, 208 U. S. 412; *Holden* v. *Hardy*, 169 U. S. 366.

The statute now under consideration simply presents once more the ancient conflict between the unrestrained and injurious use of property and justice.

II. The means employed, the prohibition of pipe lines except upon condition that they act as common carriers, has a real and substantial relation to the object sought, the prevention of monopoly, and is not arbitrary or beyond the necessities of the case.

The Pipe Line Amendment in substance prohibits purely private pipe lines and declares that henceforward oil shall be transported through pipe lines in interstate commerce by common carriers alone.

A majority of the court below, admitting the Government's argument as to the construction and purpose of the act, nevertheless were of opinion that there is no reasonable relation between the private operation of pipe lines and the upbuilding of monopoly. In other words, in the last analysis, the decision below turns upon a question of fact, namely, whether Congress was wholly unreasonable in believing that the owners of pipe lines have such an advantage over the well owners and purchasers of crude oil as warrants governmental intervention.

The following excerpts from the opinion, which we designate "premise" and "conclusion," demonstrate the error of the court:

Premise:

> True, the possession of a pipe line enables its owner to transport his oil to the refinery or other market at very small cost compared with any other means of conveyance. *The practical result may be, and in most instances doubtless would be, that other producers find it to their interest to sell the output of their wells to the owner of the pipe line,* and in this sense it may be said that *they are obliged to sell to him. Granted that his pipe line gives him such command that he is able to control or even fix the selling price of the crude article in that particular field or territory,* upon what sustainable theory can it be claimed that other producers are deprived of anything which rightfully belongs to them because they do not or can not provide themselves with the same means of reaching the market? * * * (No. 481; R. 125.)

* * * * *

Conclusion:

> In our judgment there is no basis for the contention that the pipe-line amendment has any real or substantial relation to the monopoly. (No. 481; R. 127.)

Thus the court below seems to have disregarded the established rule that the presumption favors the conclusion of Congress on such questions of fact. Chief Justice Marshall said in *McCulloch* v. *Maryland*, 4 Wheat. 315, 423:

> But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into *the degree of its necessity*, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

And this principle has been applied in such cases as *Powell* v. *Pennsylvania*, 127 U. S. 678–685, *Austin* v. *Tennessee*, 179 U. S. 343–348–9, and *Jacobson* v. *Massachusetts*, 197 U. S. 11–31, which illustrate the reluctance with which the court should oppose its personal views to the deliberate judgment of the legislative branch and a strong preponderating public opinion.

In *Powell* v. *Pennsylvania* the court quotes with approval the language of Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700, to the effect that "every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Continuing the court says (p. 685):

> It is not a part of their (the courts) functions to conduct investigations of fact entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determina-

> tion of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large.

And in *Austin* v. *Tennessee, supra*, a State statute prohibiting the sale of cigarettes was upheld, the court saying:

> Cigarettes do not seem, until recently, to have attracted the attention of the public as more injurious than other forms of tobacco, *nor are we now prepared to take judicial notice of any special injury resulting from their use* or to indorse the opinion of the Supreme Court of Tennessee that "they are inherently bad and bad only." At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a *belief in their deleterious effects*, particularly upon young people, *has become very general*, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. *Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold or to prohibit their sale entirely* (348, 349).

But aside from the presumption in favor of the law, it is clear, the court below to the contrary notwithstanding, that Congress was fully justified in concluding—

(1) That the private operation of pipe lines carrying oil in interstate commerce tends to monopoly.

(2) That an appropriate means of reaching the evil was to prohibit their operation save as common carriers.

Of these in order:

(1) The private operation of pipe lines carrying oil in interstate commerce tends to monopoly.

This court itself has independently reached the same conclusion as did Congress. The findings of the court below as to the relation between the pipe lines and the monopoly is directly opposed to the findings of this court in *Standard Oil Company* v. *United States*, 221 U. S. 1. The petition in that case charged, *inter alia:*

> * * * restraint and monopolization by control of pipe lines * * * (221 U. S. 42.)

The decree of the Circuit Court sustained this charge and stripped the Standard of most of the very pipe lines here in question. Nor can we forbear to note that the same distinguished counsel who now represent that corporation, then, as now, protested in the following terms:

> The ownership of the pipe lines has not been a means of monopolizing. Substantially all of the pipe lines owned by the Standard Oil companies have been constructed by those companies. There has never been any exclusion of anyone from the oil fields either in the production of oil, or its purchase, or its storage, or its gathering or transportation by pipe lines. Ownership of the pipe lines does not give the

> Standard companies any advantages in dealing with the producers which are not open to others.
>
> The decree erroneously includes and operates upon several of the appellant companies. (221 U. S. 12.)

Nevertheless this court, while not in terms referring to that contention, in effect completely overruled it by supporting the portion of the decree complained of (221 U. S. 80–81); in other words, it held these pipe lines to be what their counsel claimed them not to be—"*the means of monopolizing*" the oil industry.

The decision of the *Standard Oil Case* necessarily involved the affirmation of the principles upon which this suit must be decided.

Furthermore, there have been two most thorough investigations of this question, made by direction of Congress; first, the investigation in 1905–6 by the Commissioner of Corporations, whose report was the occasion for the passage of the law in question; second, the investigation in 1906–7 by the Interstate Commerce Commission.

The Report of the Commissioner of Corporations, entitled "Report on the Transportation of Petroleum" (59th Cong., 1st Session, House Doc. 812) contains the following statements:

> The Standard Oil Company, by reason of its vast resources, its efficient organization, and its extensive facilities, has, apart from traffic discriminations, advantages in transportation which are now commonly spoken of as natural. * * * Chief among the advantages which, aside from present railroad

discriminations, the Standard possesses are the immense pipe-line systems of the company, which enable it at low cost to collect crude oil at highly favorable locations for refining. * * * The advantages of a pipe line over a railroad in the transportation of oil can hardly be overstated (p. 29).

This estimated cost of transportation by pipe line is only about one-fourth the cost of rail transportation. * * * The advantage which the Standard Oil Company possesses, by reason of its practice of transporting crude oil from the field to distant refineries by means of pipe lines, may be considered in part a *natural advantage due to its enormous capital* * * * (p. 62).

The Standard Oil Company has all but a monopoly on the pipe lines in the United States. Its control of them is one of the chief sources of its power (p. 37).

The Report made by the Interstate Commerce Commission (59th Cong., 2d Session, House Doc. 606), from "thousands of pages of testimony," taken at public hearings, where witnesses testified under oath, Standard Oil counsel were present, and the right to cross-examine and to tender counter testimony was fully accorded (p. 2), is even more emphatic. It says:

At the basis of the monopoly of the Standard Oil Company in the production and distribution of petroleum products rests the pipe line. * * *

The advantages which the possession of these pipe lines gives to the Standard are apparent

upon the surface. The refineries of the independent producer who, as a rule, has no pipe line of any considerable extent, and who generally depends upon that of the Standard for his supply of crude material, are located for the most part near the source of the crude supply. Upon the other hand the Standard locates its refineries near the great centers of distribution. * * *

The possession of these pipe lines enables the Standard to absolutely control the price of crude petroleum and to determine, therefore, the price which its competitors in a given locality shall pay. * * * (p. 5).

In any industry whoever controls the avenues of transportation of either the raw material or the finished product can speedily drive all competitors out of existence. The production and distribution of petroleum is no exception to this rule. While there may be a feeble competition in limited areas, even that must rest largely upon the sufferance of the Standard Oil Company so long as it has practically the exclusive use of its present system of pipe lines (p. 6).

CONCLUSIONS.

We were required by the resolution under which this investigation has proceeded to suggest remedies for ascertained wrongs.

More than anything else the pipe line has contributed to the monopoly of the Standard Oil Company, and the supremacy of that company must continue until its rivals enjoy the same facilities of transportation by this means. * * * (p. 14).

Other public authorities have reached similar conclusions. The Secretary of the Interior by a regulation promulgated pursuant to 33 Stat. 65, effective December 21, 1906, refused to grant pipe line rights of way through public lands in Oklahoma and Indian Territory except upon condition that the grantees accept and deliver shipments of oil at any regular station on their line. Similarly the legislatures of Kansas (*Laws 1905*, Ch. 315, Sections 1, 2) and West Virginia (*Code W. Va. 1906*, Sections 2229, 2829, 2830), and perhaps others have prohibited pipe lines altogether except upon that basis.

The reasons are obvious. It is an accepted economic principle that certain industries, particularly those carried on by means of expen ive transportation facilities, possess an inevitable tendency to monopoly, and are in fact one kind of *natural* monopoly. The pipe lines stand upon the same basis as water companies, gas companies, electric lighting systems, railroads, telephones, and all the other "industries of increasing returns."

They differ from the others chiefly in this, that in the case of other industries, the danger to the public lies in their power to extort an unfair price for the commodity they *sell*, as water, gas, electricity, transportation, storage, etc. But if the public is harmed by any one corporation becoming the exclusive *seller*, so it may be harmed by any one corporation becoming the exclusive *buyer;* especially when the commodity bought is an article of public need and of which the exclusive buyer at

once becomes the exclusive seller also. Men are harmed in exactly the same way by being forced to sell their oil too cheap as by being forced to buy their oil too dear. One form of extortion is as unjust and as harmful to the public as the other, and the pipe-line owner has a constant opportunity for both.

It is idle to suggest that the individual well owners or refiners ought to build pipe lines of their own. Every farmer might equally as well construct a railroad and every cottage have its private gas plant. The initial cost is too great and the quantity of oil too small. The *Report of the Commissioner of Corporations* turns the light of history on this suggestion and disposes of it in the following language (59th Cong., 1st Sess., House Doc. 812, p. 30):

> Nor has the failure of independent shippers to construct pipe lines of their own been due wholly to lack of enterprise on their part. It is obvious that the construction of a vast pipe line system requires an amount of capital far beyond the resources of the average independent refiner. This method of transportation for long distances is in fact economical only where the volume of traffic is great. The methods of competition practiced by the Standard Oil Company have prevented its competitors from building up a business sufficient to justify such outlay. An attempt was made in the case of one important independent pipe line enterprise—that of the United States Pipe Line Company—to avoid this difficulty by cooperation, but it was only after nine years of large expenditure and constant strug-

> gle against opposition of both the Standard Oil Company and the railroads that this company finally completed its lines to tidewater, and this line is a very small one compared with those of the Standard. An earlier enterprise, that of the Tidewater Oil Company, which laid the first pipe line to the seaboard, was so bitterly attacked by the same interests that it speedily surrendered to the Standard Oil Company.

The same practical necessities which this report points out as the origin of the monopolistic character of pipe lines were held to be the origin of the monopolistic character of railroads by this court itself in *Texas and Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197, 210:

> Before we consider the phraseology of the statute, it may be well to advert to the causes which induced its enactment. They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, they are so practically. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing

> such means of carriage. From the very nature of the case, therefore, railroads are *monopolies*, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. * * *

In practical result, and that is the thing courts and legislatures are concerned with, the small well owner is in a position very closely resembling that of the mine owner in *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, who had no right of way out of his mines; or the owner of the arid land in *Clark* v. *Nash*, 198 U. S. 361, who had no means of bringing water in, and was allowed to use his neighbor's irrigation ditch. The shipment of oil except by pipe line is a practical impossibility. No other means of transportation can possibly compete with it. Without a pipe line the oil producer is, as it were, shut in by an impassable barrier.

But even these analogies do not adequately express the difficulties of the small producer. The possibilities of duress are even greater in the case of oil wells than in the case of mines and arid lands. The mine owner can shut up his mine and hold it, but the wells once opened can not be closed to await a more convenient season. And if they could be, or if they were not opened in the first place, the owner of the oil land would only lose instead of gain by waiting, because oil lies in great subterranean reservoirs, and the pumping of the wells upon adjacent lands would drain the common source. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190. Therefore the small producer is compelled either to sell his oil, or to sell the wells

themselves, to the owner of the pipe line at whatever terms the latter may choose to offer.

He is caught beneath the sheer weight of capital, and has no alternative except to yield.

The court below says that there is no connection between monopoly and a situation where "the greater number of oil producers are virtually compelled to sell their output to the owners of private pipe lines" (No. 481, R. 127); but Mr. Justice Holmes said, in *Swift* v. *U. S.*, 196 U. S. 375, 402:

> No more powerful instrument of monopoly could be used than an advantage in the cost of transportation.

It is largely the use of this potent instrument that has built up these enormous capitalizations; that has paid these enormous dividends; that once at least has thrown the oil industry of the whole United States into the hands of a single group of capitalists. The evidence in the *Standard Oil Case* proves it; the statistics in the Government reports prove it; the facts were in the mind of Congress when it passed this legislation. Congress has declared the possibility of its recurrence a menace to the public welfare. Congress has struck down monopoly full grown. It now seeks to destroy the source from which it sprang.

But the court below says that Congress is quite mistaken; that pipe lines have no relation to monopoly; that the right to injure the public in general and one's neighbors in particular is merely one of the legitimate and inviolable advantages arising from the acquisition of substantial amounts of property.

(2) An appropriate means of reaching the evil was to prohibit the operation of interstate pipe lines save as common carriers.

Having, then, reached the conclusion that the private operation of pipe lines tended to the public injury, was not the course which Congress took appropriate and reasonable to prevent that injury? What else could Congress have done? Any attempt to regulate the amount of oil the pipe-line owner should draw from a given field suggests at once impossible complications, even if such a step were constitutional, and not conflicting with State authority.

Strict regulation of such pipe lines as were already common carriers would have afforded only partial relief. Most of the important lines were not common carriers. Those that were ostensibly common carriers usually had their legal termini in the woods at the crossing of a state line (Fawn Grove, Center Bridge, or Unionville, for example; No. 482, R. 4-5), where their delivery stations were purely fictitious. The real termini where oil would normally be received or delivered, were owned by separate, non-common-carrier corporations.

Disintegration of the Standard Oil Company (ultimately approved by this court as a reasonable means to the similar end sought in the *Standard Oil Case*, but not yet attempted when this act was passed), would not have freed the producer of the raw material. Each separate pipe line would still have held a monopolistic power within its own tributary area.

Moreover, this would merely have destroyed one particular monopoly, leaving still available the means by which others might be created.

Government ownership either by the construction of new pipe lines (involving sheer economic waste of duplicating plants), or by the condemnation of existing lines would have been a step so radical, with possibilities of such far-reaching evils, that Congress was well justified in refusing to take it so long as any other possible alternative existed.

The course actually selected does not take the pipe line out of the possession of its owner. It does not compel him against his will to engage in the business of carrying oil as a common carrier. He may discontinue the use of his pipe line entirely if he chooses. He may continue to operate it, accepting and carrying for reasonable compensation and under reasonable regulations and conditions whatever oil others may offer him together with his own. Or he may sell the pipe line to some one else who will so operate it. His position in no whit differs from that of the various banking companies discussed in *Noble State Bank* v. *Haskell*, 219 U. S. 575–580, as to which the court said:

> In this case there is no out and out unconditional taking at all. *The payment can be avoided by going out of the banking business and is required only as a condition for keeping on from corporations created by the State.* We have given what we deem sufficient reasons for holding that such a condition may be imposed.

Nor does the act require anything even remotely resembling the impossible.

The operation of pipe lines as common carriers is beyond question commercially practicable, and has been universally recognized.

Turning for light upon this question to sources such as were examined by this court in *Shollenberger* v. *Pennsylvania*, 171 U. S. 1, 7–8–9, and *Muller* v. *Oregon*, 208 U. S. 412, 419, we find the following:

(*a*) *Prior Federal legislation.*

An act of Congress (33 Stat., 65) authorizes the Secretary of the Interior to grant pipe lines rights of way through Oklahoma and Indian Territory under such conditions as he shall prescribe. Pursuant to this act the Secretary promulgated, effective Dec. 21, 1906, a set of regulations for the granting of such rights of way which provided that—

> * * * no application for the construction of a pipe line will be approved unless the applicant agrees that such pipe line shall be held to be a common carrier and agrees to all the provisions hereof. * * *. The approval of any application for oil-pipe lines and other privileges is on the condition that the permittees thereof shall accept and deliver shipments of oil at any regular station on their line.

(*b*) *Prior Federal decisions.*

Although under the authority of the *Shollenberger case*, *supra*, (where the court considered evidence given in the case of *People* v. *Marx*, 99 N. Y. 377, 381) this court might perhaps look into the record of the

evidence in the case of *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, it is doubly certain of that right in view of the fact that by stipulation of counsel that evidence was made a part of the record before the Commission. A summary of such portions of the Standard Oil evidence as relates to pipe lines may be found, accompanied with citations to the original record, in the Government brief in that case (U. S. records and briefs, 1910) at pages 140, 154, 169–177 of Vol. I, and pages 22, 67–150 of Vol. II. We call the attention of the court particularly to pages 106–120 of Vol. II, where there is extended discussion of evidence based upon elaborate experiments, proving that it is commercially practicable for pipe lines to act as common carriers.

(*c*) *State legislation.*

The following States (including practically all in which any considerable production of crude oil exists) have granted to pipe lines the power of eminent domain and have otherwise recognized the fact that they may act, and do commercially act, as common carriers. Kansas and West Virginia, at least, have prohibited them on any other basis. The Kansas statutes are particularly interesting, since they contain full provisions for treating oil as grain and other fungible goods are treated in elevators and warehouses. The date immediately following the name of each State is the year in which its statutes on the subject were enacted:

Arkansas (1905); §§2991*a*–2991*b*, Supp. Kirby's Dig. Ark. Stat., 1911.

California (1891); Code C. P., s. 1238, par. 10.

Colorado (1891); R. S. Colo., 1908, ss. 2461, 2439.

Illinois (1913); "An act to provide for the regulation of public utilities."

Indiana (1891); Burns. Annot. Ind. Stat., 1908, s. 5148 et seq.

Kansas (1905); Laws, 1905, ch. 315, ss. 1, 2. Dassler's Gen. Stat. Kan. ch. 48, Art. IV.

Kentucky (1900); Ky. Stat., 1909, s. 3766 *b*.

Louisiana (1906); Acts of State of La., 1906, No. 39, p. 54; also Act No. 36 (*id.* 52).

Nebraska (1903), ss. 4575, 4581, Comp. Stats., 1911.

New York (1890); Birdseye's C. & G. Consol. N. Y. Laws, vol. 5, s. 50, p. 6311–6316.

Ohio (1868); Page & Adams Annot. Oh. Gen. Code, ss. 10128, 10129, 10132.

Oklahoma (1908); Const., art. 9, ss. 2, 4, 18, 31, 34; s. 786 (1890); ss. 4309, 4313 (1909) Rev. Stats.

Pennsylvania (1872, 1883, 1907); P. & L. Dig., 1910, vol. 1, p. 1903; *Id.* vol. 3, p. 6399.

Texas (1899); Supp. to Sayles Tex. Civ. Stats., 1897–1906, p. 104, ch. 15a, §§ 1–6.

West Virginia (1879); Code of W. Va., 1906, ss. 2229, 2829, 2830 to 2851, inclusive.

Wyoming (1891); Const., art. 10, § 7; Wyo. Comp. St., s. 4202.[1]

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[1] For convenient reference we print the several statutes referred to as an Appendix to this brief.

(*d*) *State decisions.*

The following cases, either directly or obiter, hold that pipe lines are, or may become, common carriers:

W. Va. Transp. Co. v. *Volcanic Oil & Coal Co.*, 5 W. Va. 382.

W. Va. Transp. Co. v. *Ohio River Pipe Line Co.*, 22 W. Va. 600.

Gas Co. v. *Lowe and Butler*, 52 W. Va. 662, 664, 665.

Griffin v. *S. W. Pa. Pipe Line*, 172 Pa. St. 580.

Columbia Conduit Co. v. *Commonwealth*, 90 Pa. St. 307.

Nat. Transit Co. v. *Weston*, 121 Pa. St. 485, 494.

Boyle v. *Smithman*, 146 Pa. St. 255.

(*e*) *Public records and reports.*

40 Cong. Rec., part 7 pages 6361–6373, and the other citations given under Point I of this brief, to the debates accompanying the passage of this act, show that the practicability of pipe lines as common carriers was perfectly familiar to those cognizant with the oil industry.

The Report of the Commissioner of Corporations, 59th Congress, 1st session, House Doc., vol. 100, No. 812, pages 29, 36, 44, 49, 60–62, 86. This is the report upon which the present act was based. It shows the practical monopoly of the pipe lines by the Standard Oil Company, the enormous advantages arising from their control, and the utter impossibility of bona fide rail competition.

Report of the Commissioner of Corporations on the Petroleum Industry (May 20, 1907), Part I, pp. 26–38;

152 *et seq;* 196–206, which discusses the entire subject with even more fullness than the earlier report.

The tariffs of other pipe-line companies filed with the Interstate Commerce Commission show that numerous companies, including the Texas Company, the largest competitor of the Standard Oil Company, and numerous subsidiaries of the Standard Oil itself, are acting as common carriers, and many of them have so acted for years. A partial list of those which have filed tariffs is as follows:

National Transit Co.
N. Y. Transit Co.
Producers & Refiner's Oil Co. (Ltd.).
Buckeye Pipe Line Co.
Columbia Pipe Line Co.
Crescent Pipe Line Co.
Cumberland Pipe Line Co.
Emery Pipe Line.
Eureka Pipe Line Co.
Gulf Pipe Line Co.
Indiana Pipe Line Co.
S. W. Pennsylvania Pipe Lines.
Southern Pipe Line Co.
The Texas Co.
United States Pipe Line Co.

(*f*) *Current sources of public information, encyclopedias, textbooks, etc.*

Encyclopedia Britannica, 9th ed., vol. 18, p. 718, sub. tit. Petroleum, contains a description of the practice of treating oil like grain in elevators wherever pipe lines are common carriers.

New International Encyclopedia, Vol. XIII, p. 1020, gives the different grades of oils, which, measured by

specific gravity, range from 30° to 46° on the Baumé scale, in which water has a specific gravity of 10.

Wyman, Public Service Companies, s. 416, states that pipe lines should be made common carriers and compelled to handle oil as grain elevators handle grain.

(*g*) And finally, even admitting the allegations of fact contained in the pleadings in the present cases they do not make out (as to establish their case they must make out) the commercial impossibility of the common carriage of oil.

For instance, The Prairie Oil & Gas Company, No. 506, alleges only that oils of the *highest and the lowest* grades can not be transported through pipes *of the kind now owned* by them, without much intermixture as would leave the common stock *more valuable* than the poorer and *less valuable* than the best grades of oil. Clearly such allegations make out no case of impossibility. There are *many* grades of oil, and the petitioner might properly impose reasonable limits as to the grades it would receive, as a railroad is not compelled to carry whole steel bridges or other articles unfit to be carried on railroads. Such regulations are found in the tariffs of those companies who do act as common carriers. (See certified copies of regulations of the Texas Co. and of the National Transit Co., No. 481; R. 155–159.)

Furthermore, petitioners have not alleged that they could not, by reasonable readjustments of their facilities (as, for instance, cutting out "loops," or devot-

ing one pipe to one sort of oil and another to another), carry even the highest and the lowest grades with so little mixture that it would be commercially negligible.

And finally, although they allege that the resulting mixture would be *more* valuable than the poorer and *less* valuable than the best, they do not, and they could not, allege that it would be so much more or so much less valuable that a scheme of differentials *could* not be devised, whereby the shipper might pay or receive a proper allowance, according to the character of his oil, and accept either his own slightly contaminated oil, or a like quantity of general intermixture, at destination; nor do they allege that carriage of the intermediate grades would not be commercially practicable.

The Uncle Sam Oil Co., No. 507, alleges that it—

> has no means whereby it could receive, store, transport, and deliver to another *the same oil* that should be tendered for transportation; that *under these conditions* it is physically impossible for your petitioner to assume the duties and responsibilities of a common carrier to receive, store, transport, and deliver to the consignee or owner the *same* oil which may be tendered for shipment. (R. 4.)

These allegations require no further comment, for we have already shown above that delivery of the identical molecules is not essential to the common carriage of oil.

No. 508, Robert D. Benson et al. v. *U. S.*, contains no allegations as to the physical impossibility of pipe lines serving as common carriers.

No. 481, The Ohio Oil Co. v. *U. S.*, contains only the allegation that compliance with the order would cause—

> great loss to petitioner because the transportation through its pipes of oils of varying grades and gravities would produce a large amount of contamination, with a resulting substantial depreciation in the quality and value of the oil belonging to your petitioner. (R. 5.)

Admitting, for argument, that injurious contamination would result from *any* mixture, a rate, or a scheme of differentials, that would repay petitioner for the injury to his oil would be a reasonable regulation, and petitioner does not, and could not, deny its commercial practicability.

No. 482, Standard Oil Co. v. *U. S.*

Allegations as to impossibility identical with those in No. 481, *supra* (see R. 8), except that the words "grades and gravities" are qualified by the expression "*widely* different." It would seem, therefore, that in addition to the contamination charge which we suggested in No. 481, the Standard Oil Co. might further protect itself by regulations which would exclude *too* "*widely* different grades and gravities" altogether, or set apart special lines for special grades of oil.

No. 483, Standard Oil Co. of Louisiana v. *U. S.*

Allegations identical with those of the Standard Oil Co., No. 481, *supra*. (R. 5.)

The various reasons which the appellees assign for asserting that the act requires impossibilities are quite of a piece with the carefully timed transfer by the New York Transit Company and the National Transit Company of the discharging ends of their lines to the Standard Oil Company of New Jersey. If impossibilities and inconveniences exist they are in large part due to the appellees themselves and to the efforts they are making to escape the operation of the law.

III. Nothing in the Constitution prohibits the adoption by Congress of this means, so found to be in fact reasonable and appropriate to the accomplishment of its purpose.

The Constitution provides (Article I, Section 8) that:

> The Congress shall have power * * * To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

This act is, in fact, as we have shown, "necessary and proper for carrying into execution" the power to regulate interstate commerce, and therefore, under the clear rule established ever since *McCullough* v. *Maryland*, 4 Wheat. 315, *supra*, it must be held valid

unless it violates some prohibition elsewhere explicitly made in the Constitution.

Two explicit prohibitions, both in the Fifth Amendment were urged by the petitioners below:

(1) The due process clause.

(2) The clause against taking private property for public use, without just compensation.

We regard it as thoroughly established by the decisions of this court that neither of these clauses is violated by such a statute as this.

(1) The Act is not in violation of the due process clause.

The due process clause does not prevent Congress from regulating commerce by prohibiting a kind of commerce harmful to the public. *Hoke* v. *U. S.*, 227 U. S. 308; *The Lottery Case*, 188 U. S. 358. Nor does it limit the power to regulate commerce to the protection of health, morals, and order. It may be exerted for purely economic purposes whenever the strong, preponderant public opinion believes that there is a great public need. *Noble State Bank* v. *Haskell*, 219 U. S. 104; *C. B. & Q. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 592, and the Anti-trust and other cases, *supra*.

(*a*) *In many instances regulations of interstate commerce have been upheld which take the form of prohibition except upon such terms as would protect the public welfare.*

These have been held constitutional even though compliance with the condition has incidentally resulted in great expenditure of money, or the un-

compensated restriction of what had theretofore been a legitimate use of property.

The *Commodities Case*, *U. S.* v. *Del. & Hudson Co.*, 213 U. S. 366, is directly in point. It was there held that Congress could prohibit common carriers from carrying their own coal, despite the fact that many of the companies affected had invested enormous sums of money in the business of mining prior to the passage of the law. There is no substantial distinction between that case and the present. In both the motive of Congress was the same—to prevent an unconscionable use of an advantage in the means of transportation. In the one case the owner of a railroad is forbidden to carry his own coal—unless he first parts with ownership; in the other the owner of a pipe line is forbidden to carry his own oil—unless he transports also the oil of others for reasonable compensation. The same reasoning which supported the one supports the other also.

In *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, Mr. Justice Lurton, upholding the constitutionality of the Carmack Amendment, said:

> The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests (p. 202). * * * The requirements that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages des-

> tined to places beyond their own terminal, *should be required as a condition of continuing in that traffic* to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation (p. 203).

And in *Norfolk & Western Ry. Co.* v. *Dixie Tobacco Co.*, 228 U. S. 593, the same law was held properly applicable to a case where the initial carriers had never held themselves out as "receiving packages destined to places beyond their own terminal," *i. e.*, as a condition of engaging in interstate commerce they were forced to become insurers of the goods long after their own connection with them had entirely ceased.

A third case closely in point is *Southern Ry.* v. *Reid*, 222 U. S. 424, 438, where this court upheld the provisions in the act to regulate commerce which forbid any railroad subject to the act to engage in interstate commerce *unless* its rates have first been filed with the Commission. This again was to prevent one set of shippers from obtaining unconscionable advantages over others. Discriminations were not illegal at the common law. A shipper's only right was the right to reasonable rates. Discriminations were forbidden under the act to regulate commerce because it is for the public interest that all shippers shall have equal opportunities, and this although many valuable contract rights were thereby destroyed, as in the *Mottley* case, 219 U. S. 467, and the *Armour* case, 209 U. S. 56.

(*b*) *It is immaterial that the condition is not expressed, but implied.*

In the case of *Noble State Bank* v. *Haskell, supra,* the act which this court interpreted as going "from regulation to prohibition except upon such conditions as it may prescribe" (219 U. S. 113), was *not in terms* conditional. The same is true of the Carmack Amendment, 34 Stat. 584, 595, which in the *Atlantic Coast Line* case, was held to require interstate carriers:

> * * * *as a condition of continuing in that traffic* to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies. (219 U. S. at 203.)

(*c*) *Nor is this sort of regulation confined to industries "affected with a public interest" in the technical sense.*

The court below attempted to distinguish the pipe lines from cases affecting common carriers on the ground that their owners had not "devoted their property to a use in which the public has an interest." (No. 481; R. 110.) Such a distinction regards form and ignores substance. The public has an interest in *any business which substantially affects the interests of the public,* and any individual acts of any nature whatsoever may be regulated within constitutional limits to the extent that they affect the public.

As well might the Standard Oil Co. have urged that it was not subject to the antitrust law because

it had not devoted its property to public use in the public service sense.

Of course the power to regulate commerce is not limited in its operation to public service corporations.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, and *Engel* v. *O'Malley*, 219 U. S. 128, it was held that a State may regulate the business of banking, and that regulations may go to the extent of *prohibition except under conditions* that will safeguard "the primary conditions of successful commerce," or prevent the unscrupulous exploitation of a defenseless class of poor immigrants. In the language of Mr. Justice Holmes in the *Haskell case, supra:*

> It may be said in a general way that the police power extends to all the great public needs. (*Camfield* v. *U. S.*, 167 U. S., 518.) It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that *both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce* * * * (p. 111).
>
> It is not answered by citing authorities for the existence of the right (to engage in banking) at the common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We can not say that the public interests to

> which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control.
>
> *On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe* (p. 113).

True, these bank cases arose under State laws, but the power of the Federal Government over interstate commerce, as limited by the Fifth Amendment, is practically the same, for the purpose of this case at least, as the power of a State over intrastate commerce as limited by the Fourteenth. Furthermore, the case against the pipe lines is stronger than that against the banks, because the banking business has no inevitable tendency to monopoly.

In *Mugler* v. *Kansas*, 123 U. S. 623, 669, it was held that a state may prohibit the manufacture of intoxicating liquors, although incidentally great amounts of mill property whose chief value consists in its fitness for such purposes is thereby practically destroyed. It may prohibit such manufacture *even for the maker's own use*, if it regards that as essential to the successful enforcement of the chief purpose of the act.

> The power which the States have of prohibiting such use by the individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and consistently with the existence and safety of organized society can not be—burdened with the condition that the State must compensate such individual owners for pecuniary

losses they may sustain by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

It is true, that, when the defendants in these cases purchased or erected their breweries the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance or come under an obligation that its legislation upon that subject would remain unchanged.

In *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, it was held that a state might constitutionally prohibit anyone from permitting gas or oil to escape from his well into the open air for more than two days after it was struck. The court, basing its decision on the peculiar nature of the substances in question, said, speaking through the present Chief Justice:

> They have no fixed *situs* under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of *self-transmission*. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore operates upon the other surface owners. * * * (p. 202–203).
>
> Hence it is that the legislative power, from the peculiar nature of the right and the objects

> upon which it is to be exerted, *can be manifested for the purpose of protecting all the collective owners, by securing a just distribution,* * * * (p. 210).

A still stronger case is *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, which followed *Ohio Oil Co.* v. *Indiana, supra*, and held that a state statute forbidding the pumping of mineral water at Saratoga Springs for the purpose of extracting gas alone, was constitutional because, the proportion of gas being small, it furnished an incentive for pumping an excessive amount of the water in derogation of the rights of other co-proprietors upon adjacent lands.

Suppose some great corporation, desiring to exploit its oil lands in the shortest possible time, should at great expense install pumping machinery so powerful that it could rapidly draw away the entire common reservoir. Such a thing was held to be unlawful in the case of percolating waters even at common law. (*Forbell* v. *City of New York*, 164 N. Y. 522, 526; see also, *Kansas* v. *Colorado*, 206 U. S. 46.) Clearly a statute could forbid the pumps to be used (*Manufacturers Gas etc. Co.* v. *Indiana Natural Gas Co.*, 155 Ind. 461; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 262) and if their use could be prohibited why could it not also be prohibited except upon condition that the owner should give to the adjacent proprietors an equitable proportion of their common property.

This comes very close to our problem. True, a pipe line is not a pump, but its effect is practically

the same. What is the difference between being able to raise oil infinitely faster than anyone else, and being able to transport it infinitely cheaper than anyone else? The man who is not rich enough to own a pipe line must either stand by and see his share in the joint property entirely appropriated by his more fortunate neighbor, or he must *sell* his share under conditions where freedom of contract is wholly out of the question. The Pipe Line Amendment, like the Indiana Statute, *supra*, is "for the purpose of protecting all the collective owners by securing a just distribution." It liberates the industry by freeing the producer of the raw material from that unjust duress which inevitably *restrains* interstate commerce, and, as the Government maintains, *tends always toward monopoly.*

(*d*) *Nor is the law violative of the due process clause in that, being general in its terms, it might cover any pipe lines which are not public markets for oil.*

All of the Standard Lines, which were 90 per cent of the whole mileage, bought the greater part of their oil from other well owners in the same field. So did most, if not all, the other pipe lines. In regard to the companies involved in this case the court below made the following findings:

Standard Oil Company:

> The record indicates that much the greater part of the oil, and perhaps all of it, is oil which this company has purchased. (No. 481; R. 97.)

Standard Oil Company of Louisiana:

> It purchases a considerable part of the crude oil which its lines transport. (No. 481; R. 97.)

The Ohio Oil Company:

> It is an extensive purchaser of crude oil from other producers. (No. 481; R. 97.)

Robert D. Benson et al:

> The greater part of the crude oil transported by this company is purchased from other producers. (No. 481; R. 96.)

The Prairie Oil & Gas Company:

> * * * its own wells yield only about 12,000 barrels per day and it purchases approximately 70,000 barrels per day on the average. (No. 481; R. 95.)

The Uncle Sam Oil Company:

> The extent to which this company purchases oil from other producers, if it engages in that business at all, does not appear from the record. (No. 481; R. 96.)

There is no showing in this case that there existed at the time this amendment was passed, a single pipe line not engaged in buying oil from tributary small producers. Suppose, however, that one of these pipe lines should refuse to purchase this tributary output. The only practical recourse left to the small producers would be to sell to the pipe line companies the wells themselves or else stand helplessly by and watch the draining of the common pool. The pipe line owner may choose whichever

course he pleases, *buying oil or buying wells*, and in either case the small producer is equally at his mercy.

It is no wonder that Senator Lodge was able to say in the course of the long series of debates following his introduction of this measure:

> The small well owner, to whom there have been pathetic references this morning, has not yet made his objections known to me. I heard within 24 hours after the introduction of my first amendment, on May 28, from the Standard Oil Co. A representative of that company came to see me on the following day, and represented the uselessness and injustice of this amendment. I have had a great many letters from small oil owners, and I have had a great many letters from independent refiners in support of the amendment, and the objections suggested by the Senator from Maine and the Senator from West Virginia really do not touch the case. * * * (40 Cong. Rec. 6365.)

But even supposing, for the sake of argument, that somewhere some one could be found who possessed a pipe line through which he pumped only the output of his own well, all of which he used on his own premises for fuel or other purposes—the discovery of such an individual would not invalidate this law. Lawmaking bodies are forced to legislate in a broad way, to provide rules which will be reasonably workable, and they are permitted to consider the normal case, without providing for the exceptional instance. It is enough that purely private pipe lines are *generally* the means of unfair and oppressive advantage tend-

ing toward monopoly. Whether the whole business must be stamped out or regulated in order to give the public adequate protection, is a matter of legislative discretion, as the following cases amply demonstrate.

The point is put beyond argument by the recent case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, in which Mr. Justice Hughes, announcing the holding of the court that a state, to render effectual its prohibition of the sale of malt liquors might also include within the prohibition beverages which were in themselves innocuous, said (p. 201):

> * * * It is also well established that, when a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.

See also:

Booth v. *Illinois*, 184 U. S. 425.
Lemieux v. *Young, Trustee*, 211 U. S. 489.
Powell v. *Pennsylvania*, 127 U. S. 678, 685.
Silz v. *Hesterberg*, 211 U. S. 31.
Commonwealth v. *Gilbert*, 160 Mass. 157.
Knoxville Iron Co. v. *Harbison*, 183 U. S. 13.
The Slaughter House Cases, 16 Wall. 36.

The Pure Food Law, 34 Stat. 768–770, prohibits the sale for food of any animal which "died otherwise than by slaughter," though the steer which was killed by a train, or accidentally shot, would be perfectly wholesome. Many other sections of the same law similarly include prohibitions which might cover harmless, inoffensive, and nonfraudulent food products.

It is unnecessary to go further. These instances from the great multitude of others show conclusively that where certain acts are *ordinarily* attended with public danger the legislative power is not prevented from prohibiting such acts altogether if in its judgment that is the most feasible way of eradicating the evil.

(2) Nor does the Act violate the prohibition against taking property for public use without compensation.

Congress has done two distinct things here: (*a*) it has prohibited the private operation of oil pipe lines in interstate commerce, and (*b*) it has subjected all pipe lines elected to be operated in interstate commerce to the public use as common carriers.

(*a*) *As to the prohibition of private operation, there is not a taking.*

It is merely the prohibition of a noxious agency of interstate commerce, *i. e.*, the private, monopolistic, operation of pipe lines. There is no vested right in a noxious use of property. If there had been, the *Standard Oil Trust Case* could not have been decided as it was.

In *Mugler* v. *Kansas*, 123 U. S. 623, 669, it was held that a State might prohibit the manufacture of intoxicating liquors, although incidentally great amounts of mill property whose chief value consisted in its fitness for such purposes was thereby practically destroyed.

In the *Commodities Case*, 213 U. S. 366, the court dismissed:

> * * * summarily * * * all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause * * * because obviously mere suggestions of inconvenience or harm are wholly irrelevant * * * (p. 405).

In the *Noble State Bank* case, *supra*, the Oklahoma Bank Guaranty Law was upheld although as Mr. Justice Holmes said:

> * * * there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. (220 U. S. 110.)

See also:

Union Bridge Co. v. *U. S.*, 204 U. S. 364.
The Slaughter House Cases, 16 Wall. 36.
L. & N. R. Co. v. *Mottley*, 219 U. S. 467.
C. B. & Q. R. Co. v. *Drainage Commissioners*, 200 U. S. 561, 592.

(*b*) *But it may be said that in so far as the owners elect to operate the lines under the condition, there is, of course, a "taking" in the subjection to the quasi public use as common carrier. The thing so taken is, however, only the compensated, occasional use of the pipe line.*

There is no change of title—no shift of possession—not even the acquisition of a permanent easement. An adjoining well owner, if he complies with reasonable regulations, may have his oil poured into the pipe and propelled to the other end. For that he must pay a reasonable rate. When the reasonableness of that rate is called in question the courts will make sure that the pipe line owner is adequately compensated. That question is not open at this time, however.

Two cases very clearly illustrate our meaning. In *Otis Co.* v. *Ludlow Co.*, 201 U. S. 140, the Court upheld the Massachusetts mill act. This gave the builder of a dam the right to flow the lands of upper riparian proprietors. The only provision for compensation was a right to sue the dam owner in tort for the damages actually done. Thus compensation was not even secured in advance, although the flowing of land has been held by all courts to be a "taking." (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.)

In *L. & N. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132, 150, the court refused to uphold a statute of Kentucky compelling one railroad to surrender its cars to another without security for their return. Mr. Justice McKenna, speaking for the minority of the court, laid down the principles which must govern these cases in language that is none the less valuable because the majority differed in their application of those principles to that particular case. Relying on the *Ludlow* case, *supra*, he said

(p. 150) that the exigencies of the case in hand did not require the court to decide whether the power there exercised was the police power or eminent domain; if the former, no compensation was necessary; if the latter, the right of the carrier to sue for any damage resulting (as in the *Ludlow* case), *together with the right to charge for the use actually taken, was sufficient.* The majority, however, were of opinion that as an exercise of the police power it was unreasonable, and as a taking the provisions for compensation were *not* sufficient.

The dividing line between the two cases is suggested by Mr. Justice Holmes in the *Ludlow* case, where he said—

> As no title is gained to have the water on the upper land, the dam owner *pays only for the harm actually done from time to time. If this is so, somewhat less elaborate provisions might be justified* than could be sustained when the title is lost. So far as security goes, *looking to the reasonable probabilities in such cases,* it would seem to be sufficient (p. 153).

It is apparent, then, that "somewhat less elaborate provisions" for compensation may be justified in some cases than in others—all that is necessary is that "looking to the reasonable probabilities in such cases," they shall be reasonably sufficient. And the transfer of possession is one of the circumstances for consideration.

This being so, the *Pipe Line Cases* fall rather within the rule of the *Mill Acts* than of the *Stock Yards* case.

In the *Stock Yards* case the railroad wholly relinquished the possession of its cars. Here the owner never gives up possession of the pipe lines. There the railroad was compelled to trust to the uncertain solvency of other companies and the pitfalls of litigation to recover his compensation in case of loss. Here his only loss is the use of his pipes by the oil of others. The compensation for that loss is the rate paid. That rate is a reasonable rate, and its payment is doubly secured—first by the immemorial right of the carrier to demand prepayment for his services, and, second, by the lien which he has upon the oil carried whereby he may insure payment before delivery. This makes his position even stronger than that of the upper riparian owner in the *Mill Acts* case, for there he was driven to an action of tort to collect his compensation, whereas the pipe-line owner is absolutely certain of his compensation at all times.

The case is analogous also to *Clark* v. *Nash*, 198 U. S. 361, where the court upheld a statute giving individual owners of arid lands in Utah the right to bring water through their neighbor's irrigation ditches. True, the statute provided for payment in advance for the perpetual easement acquired, but the expense of *maintaining* the ditch (which with the increased flow of water would presumably be greater) was to be paid from time to time as occasion arose, and no security was given for that. (Decree of the Utah Court given at p. 365.) Nor is there any intimation that if no permanent easement in the soil had been

taken the requirements of the case would not have been equally satisfied by payments for the use of the ditch as from time to time it should be actually used. Indeed, the inevitable conclusion from the statement of Mr. Justice Holmes in the *Mill Acts* case quoted, *supra*, is that such a provision for compensation would have been sufficient.

For the reasons thus assigned it is submitted that the decrees of the court below should be reversed, the injunctions dissolved, and the several petitions dismissed.

JOHN W. DAVIS,
Solicitor General.

SEPTEMBER 22, 1913.

APPENDIX.

STATUTES OF VARIOUS STATES WITH REFERENCE TO PIPE LINES.

(Ante p. 62,)

ARKANSAS.

The Supplement to Kirby's Digest, Statutes of Arkansas, 1911, pp. 253, 254, title "Eminent Domain—Oil and Gas Companies" (acts 1905, act 228; in force May 2, 1905), provides:

SEC. 2991a. Any corporation organized by virtue of the laws of this state, for the purpose of developing and producing mineral oil, or petroleum, or natural gas in this state, and marketing the same, or transporting or conveying the same by means of pipes from the point of production to any other point, either to refine or to market such oil, or to conduct such gas to any point or points to be used for heat or lights, may construct, operate, and maintain a line or lines of pipes for that purpose along and under the public highways and the streets of cities and towns, with the consent of the authorities thereof, or across and under the waters and over any lands of the state, and on the lands of individuals, and along, under, or parallel with the rights of way of railroads, and the turnpikes of this state; provided, that the ordinary use of such highways, turnpikes, and railroad rights of way be not obstructed thereby, or the navigation of any waters impeded, and that just compensation be paid to the owners of such lands, railroad rights of way, or turnpikes, by reason of the occupation of such lands, railroad rights of way, or turnpikes by said pipe-line or lines.

SEC. 2991b. In the event any such company shall fail upon application to individuals, railroads, or turnpike companies to secure such right of way by consent, contract or agreement, then such corporation shall have the right to proceed to procure the condemnation of such property, lands, rights, privileges, and easements in the manner now provided by law for taking private property for right of way for railroads as provided by section 2947 to section 2958, inclusive, of Kirby's Digest.

SEC. 2991c. Whenever any such corporation shall desire to construct such pipe-line or lines upon or under the lands of individuals, or right of way of any railroad, or any turnpike, said corporation, by its agents, shall have the right to enter peacefully upon said lands or rights of way and survey, locate and lay out its said pipe-lines thereon, being liable, however, for any damage that may result by reason of such acts, and shall designate on a plat or map to be made and filed with the county clerk of the county, the width of the strip of land needed to be condemned for its purposes, its location, and the depth to which such pipes are to be laid.

SEC. 2991d. Any person or persons who shall injure or molest any such pipe or pipes so used for the transportation of such oil or gas, shall be guilty of a misdemeanor, and on conviction be fined in any sum not to exceed two hundred dollars; but should such injury be done wilfully, and be of such a character as to cause such pipes to be so damaged that such oil or gas shall escape and cause damage either to the company or individuals or other corporations, then such person or persons shall be guilty of a felony, and on conviction thereof shall be fined not to exceed one thousand dollars and confined in the penitentiary not more than five years.

CALIFORNIA.

Pomeroy's Codes of Civil Procedure of the State of California, 1901, Title VII (act of 1891), "Eminent Domain," 692, provide:

1237. *"Eminent domain" defined.*

SEC. 1237. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title.

1238. *Eminent domain may be exercised, on behalf of what uses.*

SEC. 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. * * * * *
2. * * * * *
3. * * * * *

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads; paths and roads either on the surface, elevated or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric and horse railroads, canals, ditches, dams, pondings, flumes, aqueducts and pipes, for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. * * * * *
6. * * * * *
7. Telegraph lines.
8. * * * * *
9. * * * * *
10. OIL PIPE LINES.
11. * * * * *
12. * * * * *
13. * * * * *

COLORADO.

Revised Statutes of Colorado, 1908, Chapter XLV (act of 1891), title "Eminent Domain," 689, provide:

2436. *Pipe line companies—Rights of way.*—SEC. 22. Any foreign or domestic corporation organized or chartered for the purpose, among other things, of conducting or maintaining a pipe line for the transmission of power, water, air, or gas for hire to any mine or mining claim, or manufacturing, milling, mining, or public purpose, shall have the right of way for the construction, operation and maintenance of such pipe line or pipe lines, for such purposes, through any lands, without the consent of the owner thereof, where such right of way is necessary for the purpose for which said pipe line shall be used. (L. '07, p. 283, Sec. 2)

* * * * *

2439. *Common Carriers—Fees.*—SEC. 25. Any such corporation or corporations, organized or chartered for any or all of the purposes hereinbefore mentioned shall be deemed a common carrier or common carriers and shall fix and charge only a reasonable and uniform rate to all persons who desire the use of any such tunnel, pipe line, electric power transmission line or aerial railway. (L. '07, p. 284, Sec. 6)

* * * * *

2441. *Compensation for rights of way.*—SEC. 27. Any such corporation shall make due and just compensation for such right of way to the owners of the property through which it is proposed to construct, operate and maintain such tunnel, pipe line, electric transmission line, or aerial tramway, and when the parties cannot agree upon such right of way and the amount of compensation to be paid the owner of such property, the same shall be determined in manner as

now provided by law for the exercise of the right of eminent domain. (L. '07, p. 284, Sec. 7)

* * * * *

2461. *Companies that may condemn rights of way.*—SEC. 47. If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telegraph line or railroad line, shall be unable to agree with the owner, for the purchase of any real estate or right of way or easement or other right necessary or required for the purpose of any such corporation, for transacting its business, or for the right of way or any lawful purpose connected with the operations of the company, such corporation may acquire title to such real estate or right of way, or easement or other right, in the manner provided by law for the condemnation of real estate or right of way, and any ditch, reservoir, or pipe line company may in the same manner condemn and acquire the right to take and use any water not previously appropriated. (L. '91, p. 98, Sec. 3, amending G. S., Sec. 338; G. L. Sec. 304.)

ILLINOIS.

The Legislature of Illinois in 1913 passed an act entitled "An Act to Provide for the Regulation of Public Utilities," to take effect and be in force on and after January 1st, 1914, which provides *inter alia:*

SEC. 10. *Definitions.*—Unless otherwise specified, the word "commission," when used in this Act, means the State Public Utilities Commission of Illinois, which is created and established under the provisions of this Act.

The term "commissioner," when used in this Act means one of the members of the commission.

The term "public utility," when used in this Act, means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any municipality) that now or hereafter:

(a) May own, control, operate or manage, within the State, directly or indirectly for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph or telephone messages between points within this State; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water; *or for the conveyance of oil or gas by pipe line;* or for the storage or warehousing of goods; or for the conduct of the business of a wharfinger; * * *

* * * * *

SEC. 50. *Additions and New Structures—Joint Construction.*—Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order. * * *

SEC. 59. *Eminent Domain.*—When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under sections 50 or 58 or Subdivision two (2) of section 81 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

INDIANA.

Burns' Annotated Indiana Statutes, Revision of 1908, Vol. 2, Chapter 40 (act of 1891), title "Corporations—Manufacturing and Mining Companies," 583, provide:

5148. (5112) *Pipe line companies—Organization.*—1. Whenever three or more persons desire to form a company to lay on, over or underneath the ground, iron pipes or tubes, to erect pumps and pump stations and tanks for storing oil, and also to erect telegraph lines along said line or lines of pipe, and to carry on by means thereof the business of transporting and storing petroleum, they shall make, sign and acknowledge before some officer capable to take acknowledgments of deeds, a certificate in writing which shall state the corporate name adopted by the company, the object of its formation, the amount of capital stock, the term of its existence (not, however, to exceed fifty years), the number of directors and their names, who shall manage the affairs of such company for the first year, and the names of the counties in which its operations are to be carried on, and the county where its principal office shall be located, and file the same in the office of the recorder of such county, which shall be placed upon the record, and a duplicate thereof in the office of the secretary of state.

5156 (5120) *Seal—May hold real estate.*—9. Such company shall have a common seal and the same alter or change at pleasure. It shall have power to acquire, by purchase or otherwise, hold and convey such real estate and personal estate as may be necessary and proper for the purpose of erecting and keeping in repair its lines of pipes and telegraph and tanks and buildings requisite for their operation. Said cor-

poration may continue for a time not exceeding fifty years. Such corporation shall have power to acquire such real estate and rights of way as may be necessary for the uses and purposes herein contemplated, in the mode provided in the act approved February 20, 1889, authorizing natural gas companies to appropriate and condemn real estate as fully as if all that part of said act following the first paragraph of the first section and excluding the seventh section were incorporated and made a part hereof.

5159 (5122a) *Oil companies acquiring lands.*—1. That all companies, corporations and voluntary associations now organized under the laws of the state of Indiana, or which may hereafter be organized thereunder, for the purpose of laying on, over or underneath the ground, iron pipes or tubes, to erect pumps and pump stations and tanks for storing oil, and for the transportation of oil shall have power to acquire real estate for the use of such companies, corporations and voluntary associations in the mode and manner provided hereafter in this act.

5160 (5122b) *Acquiring easement in lands.*—2. Whenever any such company, corporation or voluntary association is unable to agree with the owner or owners about the purchase of any real estate in any county, desired for the construction of its trenches or the laying of the mains and the connecting of its pipe lines or on which to erect pumps and pump stations and tanks for storing oil, or on which to construct telegraph and telephone lines, it shall have the right to acquire an easement in and upon the same for each and all the purposes above mentioned, and in the manner and by the special proceedings prescribed in this act.

5161 (5122c) *Appropriation of lands*—Proceedings.—3. Such companies, corporations or voluntary associations as are mentioned in section one (1) of this act, shall have the right and are hereby authorized to enter upon any land for the purpose of examining and surveying its line for trenches and pipe

lines, and telegraph and telephone lines, and a location for pumps and pump stations and tanks for storing oil, and may acquire an easement in and upon so much thereof as may be deemed necessary for its said trenches, pipe lines, telegraph and telephone lines, not exceeding one rod in width for any single pipe line, and not exceeding one rod in width for any single telegraph or telephone line, and for such easement in real estate as is necessary for the location of such pumps and pump stations and tanks for storing oil. * * *

KANSAS.

Dassler's General Statutes of Kansas, 1909, chapter 48 (act of 1905), Article IV, title "Transportation of Oil," provide:

AN ACT Relating to the transportation of oil by means of pipe lines.

Be it enacted by the Legislature of the State of Kansas:

SEC. 1. All pipe lines laid, built, or maintained for the conveyance of crude oil within the State of Kansas are hereby declared to be common carriers and said conveyance of said oil shall be in the manner and under the restrictions in this act provided.

SEC. 2. It shall be the duty of every person, firm, association, or corporation operating under such pipeline to provide suitable and necessary receptacles for receiving such oil for transportation and for storage at the place of delivery until the same can be reasonably removed by the consignee, and shall be liable therefor from the time the same is delivered for transportation until a reasonable time after the same has been transported to the place of consignment and ready for delivery to the consignee. It shall be the duty of every such person, firm, association, or corporation to receive and forward such oil as shall be offered for shipment in the order of application therefor, upon the applicant's complying with the rules herein provided for as to the delivery and payment for such transportation. Such common carrier shall issue to the shipper a certificate showing the actual quantity and specific gravity thereof; but no application for such transportation shall be valid beyond or for a greater quantity than the applicant has ready for delivery at the time of making such application.

SEC. 3. It shall be unlawful for any such person, firm, association, or corporation to charge for the

transportation of such crude oil through its line in excess of the following rates for each barrel of forty-two gallons transported: Six miles and less, five cents; over six miles and not more than fifteen miles, six cents; over fifteen miles and not more than forty miles, seven cents; over forty miles and not more than eighty miles, eight cents; over eighty miles and not more than one hundred miles, ten cents; over one hundred miles and not more than one hundred and fifty miles, fifteen cents; over one hundred and fifty miles and not more than two hundred miles, twenty cents; over two hundred miles and not more than two hundred and fifty miles, twenty-three cents; over two hundred and fifty miles and not more than three hundred miles, twenty-five cents.

SEC. 4. The State board of railroad commissioners shall have the general supervision and control over all such persons, firms, associations, or corporations in the performance of said business, and shall prescribe reasonable rules for the conduct thereof, which rules, when prescribed and delivered in writing to any such person, firm, association, or corporation, shall be printed and posted up in a convenient, accessible, and conspicuous place at each office, station, or place of business where such oil is received or delivered. The State board of railroad commissioners is hereby authorized to prescribe reasonable maximum rates, not exceeding the rates set forth in section 3 hereof, which shall be charged for the transportation of such oil, which rate shall be binding on every such person, firm, or association, or corporation after its publica-tion in the official State paper: *Provided*, The reasonableness of such rates may be tested by proceedings therefor in any court of competent jurisdiction in this State, and such court shall, upon hearing the same, make such order as shall be proper, and such order may be reviewed by the supreme court as other civil proceedings, regardless of sum or value involved: *Provided*, Before beginning such proceedings in court to test such matters such person, firm,

association, or corporation shall execute a bond to the State of Kansas in such reasonable sum as the judge of the court in which such matter is brought shall order, conditioned that the person, firm, association, or corporation making such application will promptly pay to any shipper the difference between the rate received for transporting oil and the rate finally ordered by such court. When such maximum rates shall be fixed by the State board of railroad commissioners, the rates prescribed in section 3 of this act shall cease to be of force, and the rates so fixed by the State board of railroad commissioners shall govern, as in this section provided.

SEC. 5. Any such person, firm, association, or corporation, which shall fail or refuse to accept, transport, and deliver oil when offered up to the full capacity of such pipe line, at rates not to exceed those provided for by this act, or shall fail, neglect, or refuse to obey any rule so established by the State board of railroad commissioners, shall be liable to the person injured by such failure or refusal in the sum of five hundred dollars liquidated damage, together with reasonable attorney's fees, to be fixed by the court, in case suit shall be brought therefor; such liquidated damages and attorney's fees to be recovered in any court of competent jurisdiction; and in case of any corporation so refusing or failing, the charter board is hereby authorized to revoke the charter or permit to do business in this State of such corporation.

SEC. 6. This act shall take effect and be in force from and after its publication in the official State paper.

The said act was approved February 22, 1905.

KENTUCKY.

Carroll's Kentucky Statutes, 1909, chapter 93A (act of 1900), title "Oil and Gas—Condemnation of Land For" provide:

SEC. 3766*b*. *Condemnation of land for.*—All corporations or companies organized for the purpose of constructing, maintaining or operating oil or gas well or wells or pipe line or lines for conveying, transporting or delivering oil or gas, or both oil and gas, are hereby vested with the right and power to condemn lands and material in this Commonwealth or the use and occupation of so much thereof as may be necessary for constructing, maintaining and operating such pipe line, or lines, and all necessary machinery, pumping stations, appliances and fixtures, including tanks, telephone and telegraph lines, for use in connection therewith, together with rights of ingress and egress to examine, alter, repair, maintain and operate or remove such pipe line or lines, all such being hereby declared to be a public use; and when any such corporation or company desires to construct oil or gas pipe line or lines, or both, for the purpose of conducting, transporting or delivering oil or gas, or both, over the lands of others, shall be unable to contract or agree with the owner or owners, of land or material necessary for its use for said purposes, it may, in the mode prescribed for the condemnation of land for railroads, condemn the use of so much of said land as may be necessary for the purpose of constructing, maintaining and operating such pipe line or lines, and all necessary machinery, pumping stations, appliances and fixtures, including necessary tanks, telephone and telegraph lines, and including rights of ingress and egress to examine, alter, repair, maintain and operate or remove the same.

LOUISIANA.

The acts of the State of Louisiana, 1906, page 54, Act No. 39, approved June 29, 1906, provide:

AN ACT Relative to corporations, domestic and foreign, organized with the power to build and construct pipe lines for transportation of oil and gas, or either, giving such corporations, under certain terms, the right of expropriation, rights of way under and across all public lands and across streams and other public waters, and rights of way along, across and under public rural highways and roads, and streets and public places of cities and towns with the consent of and upon terms imposed by the local authorities having jurisdiction thereof, and declaring all corporations exercising the powers, herein contained, to be common carriers.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana:* That corporations, whether domestic or foreign, organized with the power of constructing and operating pipe lines for the transportation of oil or gas, or either, shall have the right to expropriate rights of way for such pipe lines and for telegraph, and telephone lines incident to the operation of such pipe lines and lands for tank and pumping stations, making part of such lines, or of storage stations connected therewith, and necessary to the purpose thereof.

SECTION 2. *Be it further enacted, etc.*, That said right of expropriation shall be exercised in the same manner, and by the same proceedings, and under the same limitations now imposed by law on railroads and other quasi-public corporations.

SECTION 3. *Be it further enacted, etc.*, That said corporations shall have a right of way not exceeding ten (10) feet wide for the laying of their pipe lines under and across all public lands of the State.

SECTION 4. *Be it further enacted, etc.*, That such corporation shall have the right, with their pipe lines to cross all public streams and waters of the State,

but in such case the lines shall be so constructed as not to impede or interfere with the navigation thereof, if such streams and waters are navigable, nor with the drainage through said streams and waters, whether navigable or not.

SECTION 5. *Be it further enacted, etc.*, That said corporation shall have the right to lay and maintain its pipe lines along, under and across all public rural highways and roads, and along, under and across all streets and public places in cities and towns, with the consent of the local authorities having jurisdiction or control thereof, and upon such terms as such authorities may impose.

SECTION 6. *Be it further enacted, etc.*, That the right conferred by this law upon any such corporation to lay its pipe lines under and across public lands and along and across public highways, streams and waters and streets upon the terms stated, shall also permit said corporation availing itself of such right, to construct and maintain along the route of such pipe lines, telegraph and telephone lines incident to the operation of such pipe lines.

SECTION 7. *Be it further enacted, etc.*, That no such corporation shall have power to exercise any right of expropriation herein conferred, until it shall have filed with the Secretary of State, a resolution of its Board of Directors, duly certified under its seal, consenting and agreeing that said corporation shall be a common carrier of either gas or oil, or both, and that it shall and will transport that product whereof it has declared itself a common carrier, for all persons and corporations up to the capacity of its pipe line, without discrimination or preference.

Act No. 36 (*id.* p. 52), also approved June 29, 1906, declaring pipe lines common carriers, etc., provides:

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That all pipe lines, through which gasses, oil, or other liquids are conveyed from

one point in the State to another point in the States, for a consideration, are hereby declared to be common carriers, and are placed under the control of and subject to regulation by the Railroad Commission of Louisiana.

SECTION 2. *Be it further enacted, etc.*, That the power and authority is hereby vested in the Railroad Commission of Louisiana, and it is hereby made its duty to adopt, change, or make reasonable and just charges or regulations to govern and regulate all pipe lines in this State, through which gasses, or other liquids are conveyed from one point in the State to another point in the State for a consideration.

SECTION 3. *Be it further enacted, etc.*, That all laws or parts of laws inconsistent or in conflict with this Act be, and the same are hereby repealed.

NEBRASKA.

Secs. 4575 and 4581, chapter 64, Compiled Statutes of Nebraska, 1911 (act of July 9, 1903), provide:

That any company, corporation, or association formed or created for the purpose of transporting, transmitting or conveying petroleum or other like oil, and desiring or requiring a right-of-way for the laying and maintaining of any pipe line or lines for such purpose within the State of Nebraska, and being unable to agree with the owner or lessee of any land, lot, or right-of-way on the amount of compensation for the use and occupancy of so much of any lot, land, real estate or right-of-way as may reasonably be necessary for the laying, re-laying and maintenance of any such pipe line, shall have the right to acquire the same for such purpose, as hereinafter provided.

* * * *Provided, however*, that nothing contained in this act shall be construed as granting to any company, corporation or association, any right to obtain a right of way within the corporate limits of any incorporated city or village.

NEW YORK.

Birdseye's Cumming & Gilbert's Consolidated Laws of New York, 1909, Vol. 5, page 6311, Article VI (Laws of 1890), title "Pipe Line Corporations," provide:

SEC. 40. *Incorporation.*—Twelve or more persons may become a corporation for constructing and operating for public use, except in the city of New York, lines of pipe for conveying or transporting therein petroleum, gas, liquids or any products or property, or for maintaining and operating any line of pipe already constructed and owned by any corporation, person or persons, except in such city, for the public use, by making, signing, acknowledging and filing a certificate stating the name of the corporation, the number of years it is to continue, the places from and to which it is to be constructed or maintained and operated, its length as near as may be, the name of each county through or into which it is to be constructed; the amount of its capital stock, which shall not be less than fifteen hundred dollars for every mile of pipe constructed or proposed to be constructed, and the number of shares of which it shall consist; the number of directors not less than seven, and the names and places of residence of the directors for the first year, and the place of residence of each subscriber and the number of shares he agrees to take in such corporation, which must in the aggregate equal ten hundred and fifty dollars for every mile of pipe constructed or proposed to be constructed, and twenty-five per centum of which must be paid in cash. Such certificate shall have endorsed thereon or appended thereto and as a part thereof, an affidavit made by at least three of the directors named therein that at

least ten hundred and fifty dollars of stock for every mile of line proposed to be constructed or maintained and operated has been in good faith subscribed, and twenty-five per centum paid in money thereon, and that it is intended in good faith to construct or to maintain and operate the line of pipe mentioned in such certificate, and that such corporation was not projected or formed with the intent or for the purpose of injuring any person or corporation, nor for the purpose of selling or conveying its franchise to any person or corporation, nor for any fraudulent purpose.

SEC. 42. *Condemnation of real property.*—In case such corporation is unable to agree for the purchase of any real estate required for the purposes of its incorporation, and its line of pipe in the county in which such real estate is situated has been finally located, it shall have the right to acquire title thereto by condemnation, but such corporation shall not locate or construct any line of pipe through or under any building, dooryard, lawn, garden or orchard, except by the consent of the owner thereof in writing duly acknowledged, nor through any cemetery or burial ground, nor within one hundred feet of any building, except where such line is authorized by public officers to be laid across or upon any public highway, or where the same is laid across or upon any turnpike or plank-road. No pipes shall be laid for the purpose of carrying petroleum, gas or other products or property through or under any of the streets in the cities of this state, unless such corporation shall first obtain the consent of a majority of the property owners on the streets which may be selected for the laying of pipes, and such pipe line shall be located with all reasonable care and prudence so as to avoid danger from the bursting of the pipes.

SEC. 49. *Additional powers.*—Every corporation formed under this article shall in addition to the powers conferred by the general and stock corporation laws have power:

1. To cause such examinations and surveys of its proposed line of pipe to be made as may be necessary to the selection of the most advantageous route, and for such purpose by its officers, agents or servants may enter upon the lands or waters of any person, upon, through or across which such corporation can construct its line of pipe, under the provisions of this article, subject however to liability for all actual damage which shall be done thereto.

2. To take and hold such voluntary grants of real estate and other property, as shall be made to it to aid in the construction, maintenance, operation and accommodation of its pipe line.

3. To lay out its pipe line route not exceeding twelve feet in width, but at the terminations of such line and at all receiving and discharging points and at all places where machinery may properly or must necessarily be set up for the operation of such pipe line it may take such additional width, and for such length as may be necessary.

4. To take and convey through pipes any property, substance or product capable of transportation therein by any force, power or mechancial agency, and to erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the purposes of its incorporation.

5. To regulate the time and manner in which property shall be transported over its pipe lines, and the compensation to be paid therefor, but such compensation shall not exceed the sum or be above the rate of twenty-five cents per one hundred miles for the transportation of forty-two gallons of any product transported on lines of one hundred miles in length or over, which shall be reckoned and adjusted upon the quantity or number of gallons delivered by such corporation at the point to which it shall have undertaken to deliver the same.

SEC. 50. *Use of line to be public; storage; liable as common carriers; rates and charges.*—The pipe lines of every such corporation shall be open for transportation to the public use, and all persons desiring to

transport products through such pipe line shall have the absolute right upon equal terms to such transportation in the order of application therefor, on complying with the general requirements of such corporation, as to delivery for and payment of such transportation, but no application for such transportation shall be valid beyond or for a greater quantity of products than the applicant shall then own and have ready for delivery for transportation to such corporation, and every such corporation shall provide suitable and necessary receptacles for receiving all such products for transportation, and for storage at the place of delivery until the same can reasonably be moved by the consignee, and shall be liable as common carriers therefor from the time the same is delivered for transportation until a reasonable time after the same has been transported to the place of consignment and ready for delivery to the consignee, which time shall be fixed by general regulation by the corporation, and shall not be less than two days from and after the same shall be ready for delivery and notice thereof given to such consignee, and all rates and charges of every description, for or on account of or in any manner connected with the transportation of any products, shall be fixed by such corporation by general rules and regulations, which shall be applicable to all parties who shall transport any products through such pipe line, or deliver or contract to deliver products for transportation and shall be written or printed and exposed to public view and at all times open to public examination.

SEC. 51. *Receipts for property; cancellation of vouchers; delivery of property.*—No receipt, certificate or order of any kind shall be made, accepted or issued by any pipe line corporation for any commodity unless the commodity represented by them is actually in possession of the corporation at the time of making, issuing or acceptance thereof. Whenever any such corporation shall have parted with the possession of any commodity and received therefor any order, voucher, receipt or certificate, such order,

voucher, receipt or certificate shall not be issued or used again, but shall be cancelled with the word "cancelled" stamped or printed legibly across the face thereof, and such cancelled order, voucher, receipt or certificate shall be filed and preserved by such corporation and a record of the same kept by the secretary thereof. No petroleum or other commodity received for transportation by such corporation shall be delivered to any person without the presentation and surrender of all vouchers, receipts, orders or certificates that have been issued or accepted for the same.

SEC. 52. *Monthly statements.*—Every pipe line corporation shall make monthly a specific statement showing the amount of all commodities received, the amount delivered during the month, and the stock on hand on the last day of each month of the year, and how much of such stock is represented by outstanding certificates, vouchers, receipts or orders, and how much in credit balances on the books of the corporation. Such statement shall be made on or before the tenth day of the succeeding month and verified by the oath of the president and secretary that it is in all respects true and correct, and shall be filed within three days thereafter in the county clerk's office in the county where the principal office of the corporation is located, and a true copy of the same posted in a conspicuous place in its principal office for at least thirty days thereafter.

OHIO.

Page and Adams Annotated Ohio General Code, Vol. 4, pages 1002, 1003, title "Hydraulic" provides:

SEC. 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid. (R. S. Sec. 3878.)

SEC. 10129. Such appropriation shall be made in accordance with the law providing for compensation

to the owners of private property appropriated to the use of corporations. So far as the rights of the public therein are concerned, the county commissioners as to county and state roads, the township trustees as to township roads, and the councils of municipal corporations as to streets and alleys in their respective jurisdictions, subject to such regulation and restrictions as they prescribe, may grant to such companies, the right to lay such tubing, pipes, conduits, poles and wires therein. But the right to appropriate for any of the purposes above specified, shall not include or extend to the erection of any tank, station, reservoir, or building, or lands therefor, or to more than one continuous pipe, conduit or tubing or land therefor, in or through a municipal corporation, unless the council first consents thereto. (R. S. Sec. 3878.)

SEC. 10132. Such company or companies, for the purpose of transporting natural gas, oils, water, and electricity shall be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this state. (R. S. Sec. 3878.)

OKLAHOMA.

Snyder's Constitution of Oklahoma, 1908, page 226, Article IX, title "Corporations—Definition," provides:

SECTION 1. *Have all powers not possessed by individuals.*—As used in this article, the term "corporation" or "company" shall include all associations and joint stock companies having any power or privileges, not possessed by individuals, and exclude all municipal corporations and public institutions owned or controlled by the State; the term "charter" shall mean the charter of incorporation, by or under which any corporation is formed. The term "license" shall mean the authority under which all foreign corporations are permitted to transact business in this State.

SEC. 2. *Common carriers—right to construct and operate lines.*—Every railroad, *oil pipe*, car, express, telephone or telegraph corporation or association organized or authorized to do a transportation or transmission business under the laws of this State for such purpose, shall, each respectively, have the right to construct and operate its line between any points in this State, and as such to connect at the State line with like lines; and every such company shall have the right with its road or line, to intersect, connect with, or cross any railroad or such line.

SEC. 4. *Oil pipe companies subject to control of commission.*—All oil pipe companies shall be subject to the reasonable control and regulation of the Corporation Commission, and shall receive and transport each other's tonnage or oils, or commodities, under such rules and regulations as shall be prescribed by law, or such commission.

SEC. 18. *Power of commission—may prescribe and enforce rates.*—The Commission shall have the power

and authority and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor and of correcting abuses and preventing unjust discrimination, and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void.

SEC. 31. *Corporation must incorporate in this State before it has right of eminent domain.*—No railroad, oil pipe line, telephone, telegraph, express or car corporation organized under the laws of any other State, or of the United States, and doing business, or proposing to do business in this State, shall be entitled to the benefit of the right of eminent domain in this State until it shall have become a body corporate pursuant to or in accordance with the laws of this State.

Chap. 11, Article I, section 786, and Chap. 53, Article II, sections 4309 and 4313, Revised Statutes of Oklahoma, provide:

SEC. 786. *Common carrier defined.*—Everyone who offers to the public to carry persons, property or messages is a common carrier of whatever he thus offers to carry. (1890.)

SEC. 4309. *Oil carriers are common carriers—Discrimination prohibited.*—Every corporation, joint stock company, partnership or person engaged in the business of carrying or transporting crude oil or petroleum or any of the products thereof for hire or otherwise, by pipe line, within this State, and by virtue of and in conformity to the provisions of this article, shall be deemed a common carrier thereof as at common law; and no such common carrier shall allow or be guilty of any unjust or unlawful discrimination, directly or indirectly, in favor of the carriage, transportation, storage or delivery of any crude, stock or storage oil, or any product thereof, in its possession or control, or in which it may be interested, directly or indirectly. (L. 1909, p. 427.)

SEC. 4313. *Who may have right of eminent domain.*—All persons, natural, or artificial, except foreign corporations, shall have the right of eminent domain, and any right or privilege hereby conferred, when necessary, to make effective the purposes of this article and the rights thereby conferred. Foreign corporations organized under the laws of any other State or the United States, and doing or proposing to do business in this State, and which shall have become a body corporate pursuant to or in accordance with the laws of this State, and which, as hereby provided, shall have registered its acceptance of the terms hereof, shall receive all the benefits provided by this article. (L. 1909, p. 429.)

PENNSYLVANIA.

Pepper and Lewis's Digest, 1910, Vol. 1, page 1903 (act of 1872), title "Pipe Line Companies," provides:

458. *Incorporation prior to 1874.*—The provisions of an act relating to corporations for mechanical, manufacturing, mining and quarrying purposes, approved July 18, 1863, and the supplements thereto, be and the same are hereby extended to the transportation and storage of petroleum in the counties of Venango, Warren, Forest, Armstrong, Clarion, Butler, Crawford, and Erie; and that any company organized for such purposes, under the provisions of said act, shall have the right to transport, store, insure and ship petroleum, and for that purpose to lay down, construct and maintain pipes, tubing, tanks, offices and such other machinery, devices or arrangements as may be necessary, and to enter upon, use and occupy such lands as may be requisite for the purposes of the company; and for rights of entry upon lands, rights of way and the use of materials necessary to the construction, maintenance and operation of said lines of pipes and fixtures as aforesaid, they shall be entitled to all the rights and privileges, and be subject to all the limitations and restrictions of railroad companies, as contained in the act relating to railroad companies, approved February 19, 1849, and the supplements thereto: Provided, however, That nothing herein contained shall be construed to authorize the construction of any railroad.

459. *Incorporation under the act of 1874.*—(Companies may be incorporated for) the carrying on of any mechanical, mining, quarrying or manufacturing business including all of the purposes covered by the provisions of the act of general assembly, entitled "An act to encourage manufacturing operations in this commonwealth," approved April 7, 1849, and

entitled "An act relating to corporations for mechanical, manufacturing, mining and quarrying purposes," approved July 18, 1863, and the several supplements to each of said acts, including the incorporation of grain elevators, storage warehouse and storage yard companies; and also including the storage and transportation of water, with the right to take rivulets and land, and erect reservoirs for holding water, and excluding the distilling or manufacture of intoxicating liquors; and companies may be organized under this act, having the right to transport, store, insure and ship petroleum, and for that purpose to lay down, construct and maintain pipes, tubing, tanks, offices, and such other machinery, devices or arrangements as may be necessary to fully carry out that right; and also with the right to enter upon, take and occupy such land and other property as may be requisite for the purposes of such corporations.

460. *Power to hold and convey real and personal estate.*—All companies incorporated or hereafter to be incorporated under the provisions of the act to which this is a supplement, for the purpose of the transportation and storage of oil, by means of pipe lines and tanks, for the public, shall have the power to take, hold, purchase and transfer such real and personal property as the purposes of the corporation may require, not exceeding the amount limited by its charter, together with the right to appropriate and take lands, easements and rights of way for locating and constructing steam pumps, tanks, pump houses, and offices, and laying down its pipes or tubes, connections and branches, from any point or points in any of the counties in which petroleum is produced, to any railroad, canal, navigable river, port or city within this commonwealth, and for all necessary purposes of the corporation, including right to cross railroads, and the right to appropriate a right of way and locate its pipes or tubes, upon and over, under and across any lands, waters, streams, rivulets, roads, turnpike roads, canal or other public highway, not,

however, passing through any burying ground or place of public worship, or any warehouse, mill, manufactory, store or dwelling house, without the consent of the owner or owners thereof being first had and obtained: * * *.

Pepper and Lewis's Digest, 1910, Vol. 3, page 6399 (act of 1907), title "Railroads and Canals," provides:

344. *Common carrier defined.*—The term "common carrier", as used in this act, shall apply to all corporations, or any person or persons, within the state, engaged in the transportation of freight or passengers by means of railroads or by water, or partly by railroad and partly by water, including electric railway companies, street railway companies, elevated railway companies, underground, elevated, or subway passenger railway companies, bridges and ferries, when used in connection with the transportation of freight or passengers upon any such railroad or railway; pipe-line companies engaged in the transportation of oil, either by means of pipe-lines, or by water, or partly by means of pipe-lines and partly by means of railroads or railways, or partly by means of pipe-lines and partly by means of water; sleeping- and drawing-room car companies engaged in transporting passengers upon any such railroad; express companies engaged in transporting property upon any such railroad, electric railway, street railway, or by water; and telegraph or telephone companies.

345. *Power of commission to inquire into methods and facilities of carriers.*—The commission shall have power to administer oaths in all matters in relation to its duties, so far as necessary to enable it to discharge such duties. It shall have full power and authority to inquire into the management of the business of all common carriers, including freight and passenger rates and tariffs, the equitable distribution of cars, the granting of sidings and regulation of crossings, the location of freight and passenger-stations, the adequacy of facilities for the carriage and transportation of freight and passengers, the use and com-

pensation for cars owned or controlled by persons other than the carrier, and, generally, all matters incident to the performance of their public duties, and their compliance with the provisions of their charters and the laws of the land.

346. *Persons discriminated against to make complaints—Commission to communicate with carrier—Decision.*—Any person, firm, corporation, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, complaining of any thing done or omitted to be done by any common carrier subject to the provisions of this act, in violation of law or of any decision, regulation, or recommendation of the commission, may apply to the commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same, in reasonable time, to be specified by the commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant, only for the specific violation of law complained of. If such common carrier shall not satisfy the complaint, within the time specified, and there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of, in such manner and by such means as it shall deem proper. Said commission may institute any inquiry of its own motion, in the same manner and to the same effect as though complaint had been made. No complaint shall, at any time, be dismissed because of the absence of direct damage to the complainant. The commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint as aforesaid, it shall be of the opinion that any of the rates or charges whatsoever, demanded, charged, or collected by any common carrier or carriers subject to the provisions

of this act are unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any provision of law, or that any regulation or practice in respect to transportation is unjust, unfair, or unreasonable, and in violation of law, to decide and recommend what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what regulation or practice in respect to transportation is just, fair. and reasonable to be thereafter followed.

Article I of the "Public Service Company Law" of the State of Pennsylvania, recently passed, provides:

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same* That this act shall be known and may be cited as "The Public Service Company Law."

The term "Public Service Company" when used in this act includes all railroad corporations, canal corporations, street railway corporations, stage line corporations, express corporations, baggage transfer corporations, *pipe line corporations*, ferry corporations, common carriers, Pullman car corporations, dining car corporations, tunnel corporations, turnpike corporations, bridge corporations, wharf corporations, incline plane corporations, grain elevator corporations, telegraph corporations, telephone corporations, natural gas corporations, artificial gas corporations, electric corporations, water corporations, water power corporations, heat corporations, refrigerating corporations, sewage corporations doing business within this State and also all persons engaged for profit in the same kind of business within this Commonwealth, Provided however Such persons and corporations shall not be subject to the provisions of this act with respect to any business transacted or any property owned by them outside of the Commonwealth of Pennsylvania * * *.

The term "Facilities" as used in this act includes all plant and equipment of a public service company which includes all tangible real and personal property, buildings, materials, easements, rights of way, rights of trackage subways, tunnels, railroads, street railways, tracks, canals and all animals, locomotives, apparatus, appliances, devices, instruments, appurtenances, freight cars, refrigerator cars, baggage cars, express cars, passenger cars, drawing-room cars, parlor cars, sleeping cars, dining cars, rolling stock, carriages, cabs, hansoms, taxicabs, vehicles, boats, ships, vessels, bridges, barges, cables, conduits, converters, transformers, condensers, wires, poles, structures, telegraph lines, telephone lines, crossbars, engines, machines, dynamos, boilers, motors, storage batteries, switch-boards, water falls, water-power stations, power stations, pumping stations, reservoirs, purifiers, oil tanks, gas tanks, holders, retorts, ducts, pipes, pipe galleries, *pipe lines*, mains, meters, lamps, scrubbers, wharves, piers, docks, ferries, incline planes, side tracks, spurs, turn outs, switches, systems, stations, depots, terminals, terminal facilities, water or gas jet wells, and any and all other means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for by or in connection with the business of any public service company: *Provided, however*, That no property owned by the Commonwealth of Pennsylvania or a municipality thereof at the date when this act becomes effective shall be subject to the Commission or to any of the terms of this act except as elsewhere provided herein.

TEXAS.

Herron's Supplement to Sayles' Texas Civil Statutes, 1897–1906, chapter 15a (acts of 1899), page 104, title "Oil, Gas, Salt, etc., Corporations," provides:

SEC. 1. *Not less than three may organize.*—Any number of persons, not less than three, may organize themselves into a corporation for the purpose of storing, transporting, buying and selling of oil and gas, salt, brine and other mineral solutions in this State.

SEC. 2. *Method of organization.*—The manner and method of organizing such corporations shall be the same as provided by law for the organization of private corporations in chapter 2, title 21, of the Revised Civil Statutes of the State, and the provisions of this act shall apply to all corporations already organized for any of the purposes of this act.

SEC. 3. *Powers, etc.*—Such corporations shall have power to store and transport oil and gas, brine and other mineral solutions, and to make reasonable charges therefor; to buy, sell, and furnish oil and gas for light, heat and other purposes; to lay down, construct, maintain and operate pipe lines, tubes, tanks, pump stations, connections, fixtures, storage houses, and such machinery, apparatus, devices and arrangements as may be necessary to operate such pipes and pipe lines between different points in this State; to own, hold, use and occupy such lands, rights of way, easements, franchises, buildings, and structures as may be necessary to the purpose of such corporation.

SEC. 4. *Can condemn land; lay pipes, etc., along public roads, streets, etc.*—Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, rights of way, easements and property of any person or corporation, and shall have the

right to lay its pipes and pipe lines across and under any public road or under any railroad, railroad right of way, street railroad, canal or stream in this State, and to lay its pipes and pipe lines across or along and under any street or alley in any incorporated city or town in this State, with the consent and under the direction of the board of aldermen or city council of such city or town. The manner and method of such condemnation shall be the same as is provided by law in the case of railroads; *provided*, that such pipe or pipe lines shall not pass through or under any cemetery, church, or college, schoolhouse, residence, business or storehouse, or through or under any building in this State, except by the consent of the owner or owners thereof; and *provided* further, that all such pipes and pipe lines, when same shall pass through or over the cultivated or improved lands of another, shall be well buried under ground at least twenty inches under the surface, and such surface shall be properly and promptly restored by such corporation unless otherwise consented to by the owner or owners of such land; *provided* further, that if such pipe or pipe line shall be laid over or along any uncultivated or unimproved lands of another, and such lands shall thereafter become cultivated or improved, such pipes or pipe lines shall be buried by said corporation as hereinbefore provided, within a reasonable time after notice by the owner of such lands, or his agent, to said corporation or any agent thereof; and *provided*, further, that whenever such pipe or pipe line shall cross any public road or highway, railroad, street railroad, or street or alley, the said pipes and pipe lines shall be so buried and covered as not to interfere with the use and occupancy of such road, highway, street or alley by the public, or use and occupancy of such railroad, or street railroad by the owner or owners thereof; and *provided* further, that such pipe line so laid shall not exceed eight inches in diameter.

SEC. 5. *Can borrow money, issue stocks, mortgage, etc.*—Such corporation shall have the right to borrow

money to issue stock and preferred stock, to mortgage its franchises and property to secure the payment of any debt contracted for any of the purposes of such corporation, and shall possess all the rights and powers of corporations for profit in this State wherever the same may be applicable to corporations of this character.

SEC. 6. *Discrimination forbidden.*—It shall be unlawful for any corporation organized under this act to discriminate against any person, corporation, firm, association, or place in the charge for such storage or transportation, or in the service rendered; but shall receive, store or transfer oil or gas for any person, corporation, firm or association, upon equal terms, charges and conditions, with all other persons, corporations, firms, associations for like service.

WEST VIRGINIA.

West Virginia Code, 1906, chapter 62C (acts of 1879, C. 27; 1891, C. 44), title "Transportation of Petroleum or other Oils or Liquids" provides:

SEC. 2829. *Persons and companies subject to provisions of act.*—1. Every person, corporation or company now engaged or who shall hereafter engage or continue in the business of transporting or storing petroleum, by means of pipe line or lines or storage by tanks, shall be subject to the provisions of this act and shall conduct such business in conformity herewith; and the word company whenever used in this act shall be construed to include persons and corporations.

SEC. 2830. *Duty to receive for transportation—Connections with tanks or receptacles—Delivery.*—2. Any company heretofore or hereafter organized for the purpose of transporting petroleum or other oils or liquids by means of pipe line or lines, shall be required to accept all petroleum offered to it in merchantable order in quantities of not less than two thousand gallons at the wells where the same is produced, making at its own expense all necessary connections with the tanks or receptacles containing such petroleum, and to transport and deliver the same at any delivery station, within or without the State, on the route of its line of pipes which may be designated by the owners of the petroleum so offered.

SEC. 2831. *Inspection—Grading and measurement before transportation—Receipts—Deductions for waste.*—3. All petroleum of a gravity of thirty-five degrees Baumé or under, at a temperature of sixty degrees Fahrenheit, offered for transportation by means of pipe line or lines, shall, before the same is transported, as provided by section two of this act, be inspected, graded and measured at the expense of

the pipe line company, and the company accepting the same for transportation shall give to the owner thereof a receipt stating therein the number of barrels or gallons so received, and the grade, gravity and measurement thereof, and within a reasonable time thereafter, upon demand of said owner or his assigns, shall deliver to him at the point of delivery a like quantity and grade or gravity of petroleum in merchantable condition as specified in said receipt; except that the company may deduct for waste one per centum of the amount of petroleum specified in such receipt.

SEC. 2832. *Charge for transportation.*—4. The charge for receiving, transporting and delivering petroleum of the gravity of thirty-five degrees Baumé or under, at a temperature of sixty degrees Fahrenheit, by means of pipe line or lines, shall not exceed one cent per barrel of forty-two gallons per mile; Provided, That if said rate should amount for the whole distance transported to less than ten cents per barrel, then the sum of ten cents per barrel may be charged; and, provided that if the distance be over twenty miles and not more than thirty miles, one-half cent per barrel may be charged for every mile over twenty miles; and provided, further, that if the distance be over thirty miles, the maximum charge shall not exceed twenty-five cents.

SEC. 2833. *Charge for storage.*—5. Any company engaged in storing petroleum of a gravity of thirty-five degrees Baumé or under, at a temperature of sixty degrees Fahrenheit, by means of tanks, shall be permitted to charge for storage one cent per barrel per month or part of a month, unless the same is removed within fifteen days from the date when said oil is received into the custody of such company, and shall be allowed for evaporation and waste one-half of one per centum of the oil per month unless removed within thirty days from the date of the receipt of such petroleum; but no company engaged in the business of storing petroleum of the gravity of thirty-five degrees Baumé or under, at a temperature of sixty

degrees Fahrenheit, shall charge for storage any amount in excess of that authorized by this section.

SEC. 2834. *Inspection and measurement before transportation — Receipts — Contents — Deductions for waste—Delivery—Liability for loss.*—6. All petroleum of a gravity exceeding thirty-five degrees Baumé at a temperature of sixty degrees Fahrenheit, offered for transportation by means of pipe line or lines, shall be inspected and measured at the expense of the company transporting the same, before the same is transported; and the company accepting the same for transportation, shall give to the owner thereof, or to the person in charge of the well or wells from which such petroleum has been produced and run, a ticket signed by its gauger, stating the number of feet and inches of petroleum which were in the tank or receptacle containing the same before the company began to run the contents from said tank, and the number of feet and inches of petroleum which remained in the tank after said run was completed; and all deductions made for water, sediment or the like, shall be made at the time such petroleum is measured; and within reasonable time thereafter said company shall, upon demand, deliver from the petroleum in its custody to the owner thereof, or to his assignee, at such delivery station on the route of its line of pipes as he may elect, a quantity of merchantable petroleum, equal to the quantity of petroleum run from said tank, or receptacle, which shall be ascertained by computation; except that the said company transporting said petroleum may deduct for evaporation and waste two per centum of the amount of petroleum so run, as shown by said run ticket; and except that in case of loss of any petroleum while in the custody of said company caused by fire, lightning, storm or other like unavoidable cause, such loss shall be borne pro rata by all the owners of such petroleum at the time thereof. But said company shall be liable for all petroleum that is lost while in its custody by the bursting of pipes or tanks, or by leakage from pipes or tanks; and it shall also

be liable for all petroleum lost from tanks at the wells where produced before the same has been received for transportation, if such loss be due to faulty connections made to said tanks; and said company shall be liable for all petroleum lost by the overflow of any tanks with which pipe line connections have been made, if such overflow be due to the negligence of such company; and for all the petroleum lost by the overflow of any tanks with which pipe line connections should have been made under the provisions of this act, but were not so made by reason of negligence or delay on the part of said company.

SEC. 2835. *Charge for transportation and delivery.*—7. Any company engaged in transporting petroleum of a gravity exceeding thirty-five degrees Baumé at a temperature of sixty degrees Fahrenheit, by means of pipe line or lines, may charge for receiving, transporting and delivering such petroleum not to exceed twenty cents per barrel for each barrel of forty-two gallons; Provided, however, if where the point of delivery is without this State, more than twenty cents per barrel be charged, then there shall be charged no greater sum than ten cents per barrel for receiving such oil and transporting the same that part of the distance which is within this State.

SEC. 2836. *Same—Time for commencement of charge—Deductions for waste and evaporation.*—8. Any company engaged in transporting or storing petroleum of a gravity exceeding thirty-five degrees Baumé at a temperature of sixty degrees Fahrenheit, by means of pipe line or lines and tanks, shall make no charge for storing said petroleum until after the expiration of the month following that in which the oil was run and received into custody. But it may charge for storing said petroleum of a gravity exceeding thirty-five degrees Baumé at a temperature of sixty degrees Fahrenheit, for every day after the expiration of the month following that in which said oil shall have been run and received into custody, not to exceed one-fortieth of one cent per barrel of forty-two gallons for each day thereafter said oil shall con-

tinue to remain in its custody. And such company shall make no charge for water, sediment, waste and the like in transporting or storing any petroleum after the same has been gauged or measured, before the run of the same is made, except the two per centum for waste and evaporation hereinbefore mentioned.

SEC. 2837. *Discrimination prohibited.*—9. No company engaged in transporting or storing petroleum by means of pipe line or lines and tanks shall charge, demand or receive from any corporation, company, association, person or persons a greater or less rate for the transportation or storage of petroleum than it charges, receives or demands from any other corporation, company, association, person or persons for the transportation or storage of petroleum of like gravity; and any shift, device or subterfuge made or attempted for the purpose of avoiding the provisions of this section shall be void.

SEC. 2838. *Penalties—Damages for excessive charges.*—10. Any company, its officers or agents, wilfully violating any of the provisions of sections two, three, four, five, six, seven, eight or nine, of this act, or charging for any of the services provided for in any of said sections, an amount in excess of that authorized by said sections, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars, nor more than one thousand dollars, and shall moreover be liable to the party aggrieved for all damages sustained by him by reason of such excessive charges.

SEC. 2839. *Lien for charges.*—11. Any company engaged in transporting or storing petroleum, shall have a lien upon said petroleum until all charges for transporting and storing said petroleum are paid.

SEC. 2840. *Negotiability of accepted orders and certificates.*—12. Accepted orders and certificates for petroleum, issued by any company engaged in the business of transporting and storing petroleum in this State, by means of pipe line or lines and tanks, shall be negotiable, and may be transferred by endorse-

ment, either in blank or to the order of another, and any person to whom the said accepted orders and certificates shall be so transferred, shall be deemed and taken to be the owner of the petroleum therein specified.

SEC. 2841. *Receipts, certificates, etc.—Unauthorized issuance — Duplicates — Surrender — Loss — Cancellation.*—13. No receipt, certificate, accepted order or other voucher, shall be issued or put in circulation nor shall any order be accepted or liability incurred for the delivery of any petroleum, crude or refined, unless the amount of such petroleum represented in or by such receipt, certificate, accepted order, or other voucher or liability, shall have been actually received by and shall then be in the tanks and lines, custody and control of, the company issuing or putting in circulation such receipt, certificate, accepted order or voucher, or written evidence of liability. No duplicate receipt, certificate, accepted order or other voucher shall be issued or put in circulation, or any liability incurred for any petroleum, crude or refined, while any former liability remains in force, or any former receipt, certificate, accepted order or other voucher shall be outstanding and uncancelled, except such original paper shall have been lost, in which case a duplicate plainly marked "duplicate" upon the face, and dated and numbered as the lost original was dated and numbered, may be issued. No receipt, voucher, accepted order, certificate or written evidence of liability of such company on which petroleum, crude or refined, has been delivered, shall be re-issued, used or put in circulation. No petroleum, crude or refined, for which a receipt, voucher, accepted order, certificate or liability incurred, shall have been issued or put in circulation, shall be delivered, except upon the surrender of the receipt, voucher, order or liability representing such petroleum, except upon affidavit of loss of such instrument made by the former holder thereof. No duplicate receipt, certificate, voucher, accepted order or other evidence of liability, shall be

made, issued or put in circulation until after notice of the loss of the original, and of the intention to apply for a duplicate thereof, shall have been given by advertisement over the signature of the owner thereof in at least four successive issues of a daily or weekly newspaper published in the county where such duplicate is to be issued. Every receipt, voucher, accepted order, certificate or evidence of liability, when surrendered, or the petroleum represented thereby delivered, shall be immediately cancelled by stamping and punching the same across the face in large and legible letters with the word "cancelled", and giving the date of such cancellation; and it shall then be filed and preserved in the principal office of such company for the period of six years.

SEC. 2842. *Sale, incumbrance, etc., without consent of owner.*—14. No company, its officers or agents, or any person or persons engaged in the transportation or storage of petroleum, crude or refined, shall sell or encumber, ship, transfer, or in any manner remove or procure, or permit to be sold, encumbered, shipped, transferred, or in any manner removed from the tanks or pipes of said company engaged in the business aforesaid, any petroleum, crude or refined, without the written order of the owner or owners thereof.

SEC. 2843. *Monthly statements.*—15. Every company now or hereafter engaged in the business of transporting by pipe lines, or storing crude or refined petroleum in this State, shall, on or before the tenth day of each month, make or cause to be made and posted in its principal business office in this State in an accessible and convenient place for the examination thereof by any person desiring such examination, and shall keep so posted continuously until the next succeeding statement is so posted, a statement plainly written or printed, signed by the officer, agent, person or persons having charge of the pipes and tanks of said company, and also by the officer or officers, person or persons, having charge of the books and accounts thereof, which statement shall

show in legible and intelligent form the following details of the business:

First. How much petroleum, crude or refined, was in the actual and immediate custody of such company at the beginning and close of the previous month, and where the same was located or held; describing in detail the location and designation of each tank or place of deposit, and the name of its owner.

Second. How much petroleum, crude or refined, was received by such company during the previous month.

Third. How much petroleum, crude or refined, was delivered by such company during the previous month.

Fourth. For how much petroleum, crude or refined, such company was liable for the delivery or custody of to other corporations, companies or persons at the close of the month.

Fifth. How much of such liability was represented by outstanding receipts or certificates, accepted orders or other vouchers, and how much was represented by credit balances.

Sixth. That all the provisions of this act have been faithfully observed and obeyed during the said previous month.

The statement so required to be made shall also be sworn to by said officers, agent, person or persons before some officer authorized by law to administer oaths, which oath shall be in writing, and shall assert the familiarity and acquaintance of the deponent with the business and condition of such company, and with the facts sworn to, and that the statements made in the said report are true.

SEC. 2844. *Same—Specification of amounts—Duty to keep on hand oil equal to aggregate outstanding receipts, etc.*—16. All amounts in the statements required by this act, when the petroleum is handled in bulk, should be given in barrels and hundredths of barrels reckoning forty-two gallons to each barrel, and when such petroleum is handled in barrels or

packages, the number of such barrels or packages shall be given, and such statements shall distinguish between crude and refined petroleum, and give the amount of each. Every company engaged in the business aforesaid, shall at all times have in their pipes and tanks an amount of merchantable oil equal to the aggregate of outstanding receipts, certificates, accepted orders, vouchers, acknowledgements, evidences of liability, and credit balances, on the books thereof.

SEC. 2845. *Penalties for unauthorized issuance of receipts, etc.*—17. Any company, its officers or agents, who shall make or cause to be made, sign or cause to be signed, issue or cause to be issued, put in circulation or cause to be put in circulation, any receipt, accepted order, certificate, voucher or evidence of liability, or shall sell, transfer or alter the same, or cause such sale, transfer or alteration, contrary to the provisions of this act, or shall do or cause to be done, any of the acts prohibited by the thirteenth section of this act, or omit to do any of the acts by said section directed, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of not exceeding one thousand dollars, and undergo imprisonment not less than ten days nor exceeding one year.

SEC. 2846. *Penalties for unauthorized sales, incumbrances, etc.*—18. Any company, its officers, or agents, who shall sell, encumber, transfer or remove, or cause or procure to be sold, transferred or removed from the tanks or pipes of such company, any petroleum, crude or refined, without the written consent of the owner or owners thereof, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of one thousand dollars and undergo an imprisonment of not less than ninety days and not exceeding one year.

SEC. 2847. *Penalties for failure to make reports.*—19. Any company engaged in the business of transporting by pipe lines or storing petroleum, crude or refined, and each and every officer or agent of such

company who shall neglect or refuse to make the report and statement required by the fifteenth section of this act, within the time and the manner directed by said section, shall forfeit and pay the sum of one thousand dollars, and in addition thereto the sum of five hundred dollars for each day after the tenth day of the month that the report and statement required by said section fifteen shall remain unposted as therein directed.

SEC. 2848. *Examination of companies.*—20. The holder of any receipts, certificates, accepted orders, or other vouchers or evidences of liability, or the owners of oil in the custody of any such company described and referred to in this act, to an amount not less in the aggregate than ten thousand barrels of petroleum, crude or refined, may at any time present their petition to the circuit court of any county, wherein such company may be engaged in business or have its principal office, or to any judge of said court in vacation, setting forth under oath, their ownership as aforesaid and desire for the appointment of examiners for the purposes of this section; and upon such petitioners giving bonds to be approved by the court or by the judge granting the order that they will pay all expenses and costs that may accrue in the proceedings, the court, or any judge thereof in vacation, shall forthwith appoint such number of impartial, disinterested and expert persons as may be asked for in said petition, as examiners, and shall fix the amount of their compensation; and the court or judge by order, shall direct and empower such examiners to immediately inspect and measure all the petroleum, crude or refined, in the custody of any such company named in the said petition, on the day of such inspection, and to examine the books of said company relating to the issue and cancellation of receipts, certificates, accepted orders, vouchers, or evidences of liability, and to its open accounts with persons, companies or corporations with whom it deals in the receipt and delivery of crude or refined petroleum. Such examiners when so appointed shall each immediately be

sworn before any authorized officer to perform his duties with fidelity and according to law, which oath shall be reduced to writing, signed and filed with the clerk, and they shall then make immediate inspection, examination and measurement, as required by said petition and order and by this act. And it shall be the duty of each and every such company, its officers, agents and employees, to give immediately upon request of any such authorized examiners, all the information demanded in said petition and required by this act to be reported, and also full access to the offices, tanks, pipes, books and accounts of such company. Upon the completion of such inspection, measurement and examination, it shall be the duty of the examiner or examiners, or in the event of the death, resignation, declination or inability to act of any of them, then the others, or any of them within ten days after their appointment to make to the court appointing them, a written, signed and sworn report of such examination, inspection and measurement, and file the same of record with the clerk thereof, which report shall show:

First. How much merchantable and also how much unmerchantable petroleum, crude or refined, they found in the tanks and lines of such company, and where the same was located or held by description of tanks.

Second. For the custody or delivery of how much crude or refined petroleum they found such company to be liable at the same date.

Third. How much of such liability was represented by outstanding receipts, accepted orders, certificates, vouchers, or evidence of liability, and how much by credit balances.

SEC. 2849. *Offenses by examiners.*—21. Any examiner so appointed as aforesaid who shall make any false examination, inspection, measurement or report, or shall make known directly or indirectly to any person any information he may become possessed of in the course of his examination, inspection or measurement, except by means of his report

made and filed in accordance with this act, or who shall receive directly or indirectly any fee, reward or benefit, or the promise of any fee, reward or benefit, other than that provided by this act, for the performance or non-performance of any duty or thing contemplated by this act, or connected with his said employment, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of one thousand dollars, and may at the discretion of the court, be confined in jail not to exceed one year.

SEC. 2850. *Same—Refusal to furnish information, etc.—Penalties.*—22. Any officer, agent, manager, superintendent or employe of any company engaged in the transportation by pipe lines of petroleum, crude or refined, or the storage thereof, who shall refuse or neglect after demand made to give to any authorized examiner full and free access to any and all offices, pipes, tanks, accounts, books and vouchers required by him in the pursuance of his appointment and this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of not exceeding one thousand dollars, and may at the discretion of the court be confined in jail not to exceed one year.

SEC. 2851. *Repeal.*—23. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

EMINENT DOMAIN.

SEC. 2229. *Corporations for transportation of natural gas, water, etc.—Powers—Duties and liabilities as common carriers.*—24. That a company organized for the purpose of transporting natural gas, petroleum or water, necessary for use in carrying out the provisions of this act in piping and transporting natural gas and petroleum or for boring for the same, through tubing and pipes, may enter upon any land for the purpose of examining and surveying a line for its tubing and pipes, and may appropriate so much thereof as may be deemed necessary for the laying down of such

tubing and piping, and for the erection of tanks and the location of stations along such line, and the erection of such buildings as may be necessary for the purpose aforesaid; such appropriations shall be made and conducted in accordance with the law providing for compensation to the owners of private property taken for public use; Provided, That no dwelling house, yard or garden, shall be taken for such purpose, nor shall any oil tank, gas or oil pipe line be erected or laid within one hundred feet of any occupied dwelling house without the consent of the owner thereof. And so far as the rights of the public therein are concerned, the county commissioners as to public roads, and the council of any municipal corporation, as to streets and alleys, in their respective jurisdiction, may, subject to such regulations and restrictions as they may prescribe, grant to such company the right to lay such tubing and piping therein; Provided, however, The right to appropriate for any of the purposes herein above specified shall not include or extend to the erection of any tank, station or building, or lands thereof, or to more than one continuous line of pipe or tubing, or land therefor, in or through a municipal corporation without the council first consents thereto; and all excavations shall be well filled by such company and so kept by it, in all cases. Such company shall, for the purpose of transporting natural gas, oils and water, be considered and held to be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this State.

WYOMING.

The Constitution of Wyoming, Section 7, Article X, title "Corporations," provides:

SEC. 7. *Common carriers, who are.*—All corporations engaged in the transportation of persons, property, mineral oils, and mineral products, news or intelligence, including railroads, telegraphs, express companies, pipe lines and telephones, are declared to be common carriers.

Mullen's Wyoming Compiled Statutes, 1910, chapter 279 (act of 1891), title "Railroad Corporations," provides, by Sections 4200 and 4201 for the power of eminent domain, which sections are made applicable to oil companies:

SEC. 4202. *Applicable to oil companies.*—The last two preceding sections shall also apply to all petroleum oil corporations, companies and individuals, for the right of way ten feet wide, through the school and other lands, over which the state has control, for the purpose of carrying oil through pipes, also land for pump stations, tanks and other buildings, necessary to conduct the oil product of the wells of Wyoming.

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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 481.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CORNPLANTER REFINING COMPANY,
Appellants,

against

THE OHIO OIL COMPANY,
Appellee.

BRIEF ON BEHALF OF APPELLEE, THE OHIO OIL COMPANY.

Appeal from The United States Commerce Court.

CARTER, LEDYARD & MILBURN,
Solicitors for Appellee,
The Ohio Oil Company.

JOHN G. MILBURN,
FRANK L. CRAWFORD,
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Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 481.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CORNPLANTER REFINING COMPANY,
Appellants,

AGAINST

THE OHIO OIL COMPANY,
Appellee.

BRIEF FOR APPELLEE.

Statement of Case.

The Appellee controverts such parts of the Statements of the Case contained in the briefs for the appellants as purport to set forth the "questions involved," and says that the question involved in this suit is substantially as follows:

Whether the owners of private pipe lines, who have used such lines solely as facilities for carrying on their own business, who have never carried any oil but their own, have never held themselves out as common carriers, are not organized under and derive no powers from State laws under which common carrier corporations are organized, and have never exercised or attempted to exercise and do not possess any right of eminent domain, were, by the provisions of the Inter-

state Commerce Act, as amended June 29th, 1906, subjected to that Act and charged with the duties and obligations of common carriers, and whether, if so, the Act, as to such owners of private pipe lines, be not void as in violation of the Fifth Amendment of the Constitution of the United States.

The Court below, construing the Act as embracing within its terms the owners of such private pipe lines, held that, as to them, the Act was in violation of the Fifth Amendment and, therefore, void.

Statement of Facts.

1. The essential facts were found in favor of the Appellee in the Court below. (See Opinion of Commerce Court, Record, pp. 96–9).

The Appellee, The Ohio Oil Company, is a private business corporation, incorporated July 30th, 1887, under the laws of the State of Ohio. The purposes for which it was organized and which it is authorized to carry out were stated in its original articles of incorporation as follows (italics ours) :

> " THIRD. Said corporation is formed for the purpose of drilling for and producing petroleum or mineral oil and piping or otherwise transporting and storing the same *where produced or owned by it;* and for the purpose of refining and manufacturing such oil and its varied products, and shipping, selling and marketing the same, and buying and selling such oil and its products, together with the right to acquire by purchase, lease or otherwise, oil lands and all other property necessary for the carrying out of the objects of its incorporation."

The articles of incorporation were amended in December, 1890, but no material change was made except in section Third, which, as amended, reads as follows (italics ours) :

> " THIRD. The said corporation is formed for the purpose of boring, drilling, mining and operating for the

production of oil and gas ; of producing, buying, selling, marketing and disposing of oil and gas and their various products ; of piping or otherwise transporting, and of storing oil and gas *when produced, owned or acquired by it ;* of refining and manufacturing oil and its various products ; and of purchasing, leasing, acquiring, holding and disposing of such real and personal estate as may be necessary and convenient for the carrying on of its said business."

(Record, p. 72).

It will be noticed that the power to transport oil is confined to oil " produced, owned or acquired by " the Company itself.

The Company is now engaged in the business of producing and purchasing crude oil in the States of Ohio, Indiana and Illinois, and in selling the same. It owns and has in operation a large number of wells in those three States. As an adjunct to its business the Company owns and operates its own private pipe lines passing through those States. These lines run from Martinsville, Illinois, to Wood River, Illinois, and from Martinsville, Illinois, to Preble, Indiana ; and from Bluffton, just south of Preble, to Negley, Ohio. It also leases and operates a private line running from Negley, Ohio, to Centerbridge, Pennsylvania, which line was built entirely over private rights of way (Record, pp. 2, 62).

Since the organization of the Company it has carried on its business, exercising the charter powers granted to it and no others.

Prior to 1906 it owned no pipe lines. Its sole business was the production and sale of crude oil, which was transported through pipe lines belonging to common carrier companies. Prior to that year the oil produced by the Company was all in the so-called Lima-Indiana Field, extending over the northwestern portion of Ohio and the eastern portion of Indiana, and in that portion of the so-called Appalachian Field which extends into southeastern Ohio (Record, p. 62). In the year 1906, after the discovery of petroleum in the so-called

Illinois Field within that State, the Company purchased and leased various oil properties in that Field and began to produce oil there. There was, at that time, no pipe line which reached the Illinois Field, and, in order to get the oil which it produced to market, the Company was compelled to and did build a portion of its present pipe line, extending from Martinsville, Illinois, to Preble, Indiana, through which place a common carrier line runs. From time to time, the Company extended its system of pipe lines until its present system was completed; but always for the purpose of getting to market or to delivery or shipping points its own oil, either produced by itself or purchased by it before delivery into its pipe lines (Record, p. 62).

The Company has never been, and is not now, engaged in the transportation of petroleum or any of its products for any other person, firm or corporation; but its business has always been, and is, the production or purchase and sale of crude oil; *and its transportation of such crude oil when either produced or purchased and owned by itself through its pipe lines is merely incidental to that business. Its pipe lines are used merely as a facility for the delivery of its own oil to its customers.* In fact, the Company, by the provisions of its charter, is limited to the transportation of its own oil, and the piping or transportation of oil for any other person, firm or corporation would be *ultra vires* (Record, p. 72). The Company has never made or had any contract, agreement, arrangement or understanding, whereby any other person, firm or corporation has or had any right or interest in its pipe lines, or in the use or operation thereof, or any of them (Record, p. 2).

The Company has never established, charged, collected or received from itself or any other person, firm or corporation, any tariff, rates or charges of any description for, or in respect of, the transportation of oil or other commodity through its pipe lines, or any part thereof (Record, pp. 2, 63).

All the rights of way on which the Company's pipe lines (both owned and leased lines) are laid have been acquired by private purchase. None of them has been obtained by condemnation proceedings (Record, pp. 66, 73-4). The Company has no right of eminent domain, and has never attempted or assumed to exercise such right; nor has it ever offered to carry or transport oil or other commodity through its pipe lines for the public; nor has it in any way held itself out to the public as a common carrier (Record, pp. 3, 68).

Out of a total of nearly 900 miles of trunk pipe lines, the Company has about 1.4 miles, and, out of a total of over 1,000 miles of gathering pipe lines, 5.3 miles, located on railroad rights of way. All the railroad rights of way upon which its pipe lines are located are believed to have been acquired by the respective railroads by private purchase or gift and conveyance or by prescription, and not by condemnation proceedings (Record, pp. 66, 74).

The Company's general method of transacting business is set forth at length in the affidavit of Mr. James C. Donnell. All crude oil sold by the Company is sold to be delivered at an agreed point or points, and the title to the oil does not pass until such delivery. Generally speaking, the points of delivery are at the refineries owned by the customers, or at the terminals of private lines running to and appurtenant to such refineries and belonging to the owners of the refineries; but, in some instances, oil belonging to the Company, which, at the time, is contained in one of the common carrier pipe lines is sold for delivery where it is. When the oil is to be transported beyond the Company's own pipe lines, it is so transported through some of the common carrier pipe lines, whose pipage charges are paid by the Company, and the price to the customer is the price at the point of delivery, which, of course, takes into account what it has cost the Company to get the oil to the delivery point. The Company remains the owner of

such crude oil for all purposes down to the time of delivery at the delivery points (Record, pp. 63, 64).

At the present time all the pipe lines belonging to the Company are being operated at their full capacity for the transportation of crude oil belonging to the Company, all of which it requires for the supply of crude oil to its various customers and for the carrying on of its own business. If compelled to act as a common carrier, part of the crude oil so carried would necessarily be displaced, and such displacement might reach a large amount (Record, p. 64). To the extent of such displacement the amount of crude oil which the Company could carry for itself would be diminished, and the Company would not merely lose the profits on the sale of such oil, but would also lose through inability to maintain its trade with its various customers. The cost of enlarging the Company's pipe lines sufficiently to offset such probable decrease in the amount which the present plant carries for the Company itself is stated by Mr. Donnell to amount to not far from $5,000,000 (Record, pp. 65–6).

Another serious cause of loss which might arise if the Company were required to transport oil for others would be the contamination due to the mixing of oils of different kinds in the pipe lines. Whatever may be true of other pipe lines which consist of a plurality of pipes, there is no method by which such mixture can be prevented in the pipe lines of the Appellee, because this line, for very long distances, consists of a single pipe. It is well settled that different kinds and grades of crude oil, when transported over considerable distances, mix to a substantial extent, and the mixture for refining purposes, has only the value of the inferior oil. The possibility of loss from mixing is especially serious in the case of the Appellee, because its pipe lines pass through the so-called Lima-Indiana Field, where sulphur bearing oils are produced and would presumably be

tendered to it for transportation if the Act be valid. The Appellee does not now admit into its pipe lines any of the sulphur bearing oils from the Lima-Indiana Field (Record, pp. 65-6, 75-8). As to the Gulf and Texas Pipe Line Companies referred to in briefs for the United States and Commission, there is nothing in the record to show that they carry more than one kind of oil (*i. e.*, Oklahoma crude), and as a matter of common knowledge they do not.

From the Illinois field, the chief source of supply for the Appellee, upwards of 18,000 barrels per day of crude oil are sold by the producers to other customers in competition with Appellee and are shipped out by other pipe lines (Rec., pp. 63, 67).

In a proceeding in Ohio brought by the Tax Commission of that State, on June 11, 1911, to compel the Company to submit to the jurisdiction of the Commission, the Company was held not to be a pipe line company within the meaning of the Ohio statute in that behalf.

(Record, pp. 71-2).

From 1899 until December 1st, 1911, the capital stock of the Appellee was owned and held by the Standard Oil Company of New Jersey. During all that time, however, the Appellee retained its corporate franchise, maintained its corporate organization, and managed its own affairs through its own directors and officers. It was a defendant in the case of *United States vs. Standard Oil Company and others;* and, on December 1st, 1911, in obedience to the final decree in that case, its capital stock was distributed by the Standard Oil Company of New Jersey *pro rata* among the stockholders of that company. The Appellee now has an entirely separate board of directors and officers, and is in all respects a separate and distinct corporation and absolutely independent (Record, p. 70).

2. Appellee's petition is verified, as to all essential allegations, by James C. Donnell, its President, *on personal knowledge* (Record, p. 6). So also, its moving affidavits are sworn to without qualification by Mr. Donnell and others, all of whom were in a position to have personal knowledge of the facts (Record, pp. 70, 72, 73, 74, 76, 78). On the other hand, the Appellants present no affidavits except the petition of the Intervenor, the essential allegations in which, so far as they relate to Appellee, are in terms made upon information and belief, and except the answers of the United States and of the Commission, both of which must be considered to have been verified solely on information and belief, since neither the learned Special Assistant to the Attorney General (Record, p. 36) nor Mr. Commissioner McChord (Record, p. 44) could possibly have had personal knowledge of most of the matters set forth in the answers.

Appellee's petition and moving affidavits stand, therefore, in effect, uncontroverted.

To a large extent, also, the allegations in the answers are positively denied on personal knowledge in the Appellee's moving affidavits.

The briefs for the United States and the Interstate Commerce Commission contain many erroneous statements of fact, in no way supported by the record or only supported by allegations in the answers (themselves of no probative force as above shown), which allegations are denied on personal knowledge in the affidavit of J. C. Donnell (Record, pp. 62–70). Only a few of these statements can be noticed here, but the Court is urged to read carefully Mr. Donnell's affidavit.

(*a*) At page 58, the brief for the United States, speaking as of the date of the passage of the amendment, says:

> "Most of the important lines were not common carriers."

This is a grave error and quite unsupported by the record, the real facts being that, on June 30, 1906, the total mileage of the common carrier trunk lines was more than three times that of the private trunk lines, besides which there was an immense preponderance in mileage of common carrier gathering lines.

(b) A similar error in the brief for the United States (p. 32) becomes obvious from the foregoing. The brief says:

> "As both the report of the Commissioner of Corporations and the debates in the Senate had already made clear that the Standard Oil Company, *as to the main part of these lines at least*, had never held itself out as a common carrier."

In fact, the Report, though it says little on the point, implies quite the contrary, saying (p. 30): "The pipe lines of the Standard in the Northeastern States are nominally common carriers"; and the following extracts from Senator Lodge's remarks in the debates are quite inconsistent with the statement just quoted from the brief for the United States and show that he, the author and chief supporter of the amendment, supposed that all or nearly all the Standard Oil companies which operated pipe lines had the right of eminent domain and were therefore, at least *de jure*, common carriers:

At page 6365:

> "MR. LODGE: There has been legislation in regard to pipe lines in twenty-one States. Eminent domain is granted to these pipe lines in California, Colorado, Indiana, Kentucky, New York, Ohio, Pennsylvania, Texas, West Virginia and Wyoming. They are made common carriers under the laws of New York and Ohio and in Pennsylvania were held so in the absence of statute in Griffin v. The Pipe Lines, and by the Code of West Virginia. In these codes and in these laws, regulations are made by the States for regulating the method of transporting petroleum and the prices that should be charged. *They are not only made common carriers, but they are treated as common carriers*, under the statutes of these States."

Again, at page 7001:

> "MR. BEVERIDGE: Mr. President—
>
> "MR. LODGE: Wait a moment. I should like to finish. *These companies have the right of eminent domain, as I showed the other day.* They are declared to be common carriers by statute in many of the States in which they operate. * * * They carry oil for independent refineries. The independent refineries in other parts of the country try to get oil from their own wells or from other wells, and *sometimes they will carry it and sometimes they will not; but they carry for independent refineries, showing that they are ordinary carriers when they choose to be.*

Again, at page 9104:

> "MR. LODGE: There are a great many of these pipe lines—at least the principal trunk lines—that carry for hire, * * * *and they have, in almost every instance, the right of eminent domain and the usual attributes which are conferred upon common carriers.*"
>
> (40 Cong. Rec., 6365, 7001, 9104; italics ours.)

(c) Brief for the United States (page 11): That the private pipe lines here in question are located "upon or across" and "over" public highways. On the contrary, all the lines run *under* the highways (if impinging upon them at all), by virtue of rights acquired from the abutting owners, who also owned the fee of the highway.

(d) Brief for the United States, page 61: That "by stipulation of counsel that evidence *(i. e.,* from *Standard Oil Co. v. United States)* was made a part of the record before the Commission." But, the record in the proceeding before the Commission was not before the Court below and is not before this Court in this suit, and under the decisions, may not be referred to here.

Kneeland vs. Luce, 141 U. S., 437, 440.
Bd. of Commrs. vs. Sutliff, 97 Fed., 270, 282 (C. C. A., 8th Circuit, SANBORN, C. J.).

(e) There are numerous references in the brief for the Commission to the Standard Oil Company as being now the owner of all the properties which, prior to the entry of the decree in the case of *Standard Oil Co. vs. United States*, were owned by the various subsidiaries of that company. Such references only breed confusion. That decree was carried out to the letter; the stocks of the subsidiary corporations were distributed, and the various properties, including pipe lines, are now held and operated by entirely separate and independent companies.

(f) The following statements in the brief for the Commission are without support in the record (except for the answers), and are denied on personal knowledge by Mr. Donnell, or else are disproved by the records in these pipe line cases or by public documents.

Brief for Commission, pp. 2, 12, 28, 88: That prices of crude oil were and are "arbitrarily fixed by the Standard Oil Company." *Denied, Record, p. 63.* The values and amounts given in this connection in the brief for the Commission (p. 12) for the oil produced in the United States in 1906 and 1911 are presumably intended to be taken from the report of the U. S. Geological Survey, entitled "The Production of Petroleum in 1911," page 12. The value given in that report for the petroleum produced in 1905 was $84,157,399, instead of $120,000,000, as stated in the brief for the Commission (p. 12), and the increase in value, from 1905 to 1911, was about $50,000,000, instead of only $15,000,000, as stated in that brief at the same page. Moreover, the report referred to from the U. S. Geological Survey makes no mention of the prices of the Standard Oil Company, or of any of the Appellees in these pipe line cases; and the statement contained in the Commission's brief, at page 12, that the values were "fixed by the prices of the Standard Oil Company" is without any support in the record. In fact, the prices were the open market prices (Donnell, Rec., pp. 63, 67).

Brief for Commission, p. 13: That the Standard Oil Company has "18 refining plants." In fact, it has five such plants (Record, No. 482, p. 1).

Brief for Commission, p. 18: That the producers are shut up to the sale of their oil to a single company. In fact, the Oklahoma Field, from which The Prairie Oil & Gas Company draws its supply, is reached also by the lines of the Gulf Pipe Line Co. and The Texas Co., both very large companies (see Map, Rec., p. 56). Also the Illinois Field, chief source of supply for The Ohio Oil Company, is tapped by The Tidewater Pipe Co., Limited, with a line to the seaboard, and by several other lines described by Mr. Donnell. As already stated, there is a large amount of competitive buying in the Illinois field (Rec., pp. 64, 67).

Brief for Commission, page 21: "No independent refinery in the East could secure crude oil except from the Standard Oil Company." In fact, not to speak of others, the Pure Oil Company then operated an immense refinery at Marcus Hook, Pennsylvania, which it supplied through its own pipe lines (See language of Senator Lodge, quoted in brief for Commission, p. 74, and admissions in that brief, pp. 85–6). The Tidewater Oil Company also operated great refineries at New York Harbor, which it supplied by its own pipe line.

Brief for Commission, page 28: That The Ohio Oil Company delivers all its crude oil to the Standard Oil Company of New Jersey, at Centerbridge. On the contrary, The Ohio Oil Company makes very large deliveries to quite other customers at other points (Rec., p. 64).

Brief for Commission, page 39: The so-called "Conclusions of Fact" on this page contain some most surprising misstatements:

(1) "That all of the appellee companies * * * by their charters are authorized * * * *to transport oil.*" In fact, this Appellee is limited by its charter *to transporting its own oil.*

(3) " That the public, through the United States, State, and municipal governments, * * * has granted *valuable franchises* to each of these companies." In fact, no franchise of any sort, except the right to be a corporation, has been granted to Appellee.

(4) " That the oil * * * transported by these companies is of the value of $150,000,000." In fact, the total value of the crude oil produced in the United States in 1911, was only $134,044,752 (Report of the U. S. Geological Survey on Production of Petroleum in 1911, p. 12). Of the total product, more than one-third was California crude (same authority), none of which, of course, was carried by the Appellees. There must also be deducted the vast amount carried by the United States Pipe Line Co. to the refineries of the Pure Oil Co. and by the lines of the Texas Co. and Gulf Pipe Line Co. (Brief for United States, p. 64); also all the great production of the State of Texas, and very large amounts transported through the other Eastern common carrier lines without the agency of any of the Appellees.

We cannot, without unduly extending this brief, enumerate all the errors of fact in the brief submitted on behalf of the Commission, and have not attempted more than to cite various instances as illustrations.

ARGUMENT ON THE LAW.

POINT FIRST.

The Interstate Commerce Act as amended in 1906 does not apply to the Appellee nor to any owner of a private pipe line.

1. This point presents a question of statutory construction. It is contended that the pipe line amendment of 1906 brought within the purview of the Act every corporation and person that operated a pipe line for the transmission of oil between states, regardless of whether it was used by its owner for his or its own private uses, or of any other consideration, and regardless of the general objects, purposes and character of the Act. The Commission distinctly says in its opinion that it is "the plain meaning of the Act that all pipe lines carrying oil from one state to another state, no matter what their previous status, should be thenceforward considered and deemed to be common carriers." Hence, if a man owned oil wells near a State line and piped his own oil through his own pipes to his refinery across the line, his pipe line, though it had never been used for any other purpose, was to be thenceforward a common carrier line, and he a common carrier, subject to the provisions of the Interstate Commerce Act and to all the obligations and burdens it imposes on a common carrier. If this be true the amendment of 1906 was a radical innovation on the principle and purposes of the Act, which had been in existence for twenty years. It was an Act *to regulate* common carriers, not to convert those who were not such into common carriers so that they might be subject to regulation. Its principal objects "were to secure just and reasonable charges for transportation, to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable

preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a larger distance over the same line; and to abolish combinations for the pooling of freights" (*I. C. C. v. B. & O. R. R. Co.*, 145 U. S., 263, at p. 276. See, also, *I. C. C. v. Harriman*, 211 U. S., 407, 418). In other words, the Act provided a code of rules for the regulation of common carrier transportation in the interest of shippers and of the public. That is very different from the compulsory conversion into common carriers of persons and corporations who are not common carriers in any sense in order to bring them within the operation of the Act, thereby forcing them into a business in which they had never been engaged, and depriving them of the exclusive beneficial use of their property. Only language susceptible of no other construction can be sufficient to give the Act such an abnormal and unprecedented operation, even if it could be legally done. That it could not legally be done we show under another head. Here our contention is that the Act reasonably construed has no such effect (*Omaha Street Railway vs. Int. Com. Commission*, 230 U. S., 324, 335–7).

2. The Act reads:

> "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil * * * by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water * * * from one State, Territory or District of the United States or to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act."

Effect "must be given to the intention of the legislature *as manifested by the words of the statute*, interpreted according to their natural signification" (*McBroom vs. Investment Co.*, 153 U. S., 318, at p. 323), and the subject matter to which the statute

relates (*Market Co. vs. Hoffman*, 101 U. S., 112, at p. 116). "All general terms in statutes should be limited in their application so as not to lead to injustice, oppression or any unconstitutional operation if that be possible" (*Carlisle vs. U. S.*, 16 Wall., p. 153), and so as even to avoid grave constitutional doubts or objections (*Harriman vs. I. C. C.*, 211 U. S., 407, at p. 422; *U. S. vs. D. & H. Co.*, 213 U. S., 366, at p. 408). The controlling words are, "any corporation or any person or persons *engaged in the transportation of oil* * * * *by means of pipe lines* * * *." What do they mean in a statute whose subject matter is the regulation of transportation by common carriers? Obviously they mean a corporation or person *engaged in the business of transporting* oil by means of pipe lines, that is, transportation companies. Transportation is a well defined and distinct business. It is the carriage of goods for others by some instrumentality as an occupation. A man who carries or transports goods for others as an occupation is engaged in transportation or the business of transportation. But a man who transports his own goods merely as an incident to some business in which he is engaged is not *engaged* in transportation or the business of transportation. The distinction is obvious and vital. Hence, a corporation, organized to mine for, buy and sell oil, which provides its own pipe lines to collect at the wells its own oil, which it has bought or produced, and to convey it to its own storage tanks, and thence to its customers at some agreed point of delivery, is not engaged in the business of transportation or in the transportation of oil, because its use of its own pipe lines is merely an incident to its business of producing, buying and selling oil.

3. To hold otherwise is to give the statute an unjust and oppressive operation and one that is, in our judgment, clearly unconstituional. It is unjust and oppressive to deprive a person of the exclusive use of a portion of his plant that others may have the benefit of it, and to compel him with

respect to it to perform the duties, and assume the obligations, of a common carrier; and no one would venture to say that legislation having that effect does not present "grave and doubtful constitutional questions" (213 U. S., pp. 407, 408), or "a succession of such questions" (211 U. S., p. 422), as the statute is sought to be applied to the variety of conditions and circumstances under which oil is and may be transported through pipe lines.

In reply to the argument contained in the prevailing opinion of the Court below (Record, p. 102) that "it is only when a statute is ambiguous or obscure or wanting in definiteness, so that its real intent and meaning are uncertain, because the language permits differing interpretations, that the rule" above cited from the *Commodities Case* and the *Harriman Case* may be applied, we submit that the statute here under consideration is quite as ambiguous as either of those construed in the cases referred to or as the one construed in the more recent decision of *The Abby Dodge*, 223 U. S., 166, the language of which was:

> "That, from and after May first, anno domini nineteen hundred and seven, it shall be unlawful to land, deliver, cure, or offer for sale at any port or place in the United States any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida," &c. (pp. 172-3).

Notwithstanding the unequivocal character of this language, this Court held that, in order to save its constitutionality, the act must be construed as being confined to sponges taken outside the territorial jurisdiction of any State.

4. Regarding the discussion of the proceedings in Congress in connection with the pipe line amendment of 1906, it may be said that "Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body" (*U. S.*

vs. Freight Association, 166 U. S., 290, 318; *Omaha Street Ry. vs. Interstate C. C.*, 230 U. S., 324, 333). But we have found nothing in those debates or in the Report of the Bureau of Corporations on the Transportation of Petroleum of May 2d, 1906 (referred to in the Appellants' briefs), which presents the status of the Appellee or any corporation like it; that is, a corporation producing, buying and selling oil whose use of its pipe lines exclusively for its own oil is purely incidental to its main business of dealing in crude oil. Congress did not act on specific and accurate information respecting the ownership of pipe lines, or the status, character and business of the owners, or the different uses to which they are put. The promoters of the amendment and those taking a prominent part in the debate seem to have acted in the belief that, in addition to admittedly common carrier pipe lines, there were other pipe lines owned by companies engaged in the business of transportation and organized under general laws giving them the right of eminent domain, but which pipe lines were wilfully restricted in their use by their owners to the transportation of the crude oil of various Standard Oil Companies, and from which all others excepting Standard Oil Companies were excluded. (See discussion at pp. 59-64 of this brief.) It was obviously the design of Congress to subject any such lines to the Commerce Act as common carriers within the meaning and purpose of the Act, which is why amendments to insert such limiting phrases as "transportation for the public" or "transportation for hire" were not adopted. It is quite plain that it was feared that any such limiting phrases might be used by the owners of such lines as means of escape from the Act. But the Appellee, its pipe lines and its use of them were not in any such category; and there is nothing to indicate any intention on the part of Congress to force upon Appellee, or any concern like it, the functions of a common carrier, or to subject its prop-

erty, against its will, to a public use. We submit that the debates in Congress have no such bearing or significance as is given them either in the report of the Commission or in the opinions in the Court below.

5. The decision of this Court in the very recent case of *Omaha Street Railway vs. Interstate Commerce Commission*, 230 U. S., 324, seems to be a direct authority for the Appellee on this point and also on the construction of the pipe line amendment as determined by reference to other provisions of the Act.

In that case, the Omaha Street Railway owned lines of street railroads running from Omaha, Nebraska, to Council Bluffs, Iowa. The question was whether the provisions of the first section of the Interstate Commerce Act (being the very statute here under consideration), as to railroads applied to a street railroad limited by its charter to carrying passengers only and not possessing the right of eminent domain. This Court decided the question in the negative, notwithstanding the broad language of the Act. Mr. Justice LAMAR says, at page 333 (italics ours):

> " On the argument of the appeal in this court, the sole question discussed was whether the provisions of the Commerce Act as to railroads applied to street railroads, the appellant relying, among other things, on the fact that during the discussion in the Senate the author of the bill and Chairman of the Senate Committee to which it had been referred, said (17 Cong. Rec., Pt. IV., p. 3472) 'that the Bill is not intended to affect the stage coach, the *street railway*, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects.' After quoting section 1 and this statement and construing it in the light of the broad scope of the act, the Commerce Court held that *the meaning of the*

statute could not be determined from statements used in debate. We concur in that view. The Act must be interpreted by its own terms and we must look to it as a whole, in order to determine whether it applies to street railroads carrying passengers between cities divided by a State line."

And again at page 335–7 (italics ours) :

"But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'Railroad' will include Street Railroad. On the other hand, if the act was aimed at Railroads proper, then Street Railroads are excluded from the provisions of the statute * * * ."

"Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads which did not do the business Congress had in contemplation and had not engaged in the pooling, rebating and discrimination which the statute was intended to prohibit. * * *

"Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad 'subject to the Act' being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under a statute the word 'railroads' cannot be construed to include street railroad."

Companies such as the Appellee, using their pipe lines exclusively for their own businesses and not carrying for the public, could not be guilty of any of the practices which it was the object of the Interstate Commerce Act to regulate or prevent.

POINT SECOND.

As construed by the Government the Act makes common carriers of persons and corporations owning and operating private pipe lines used solely for the purpose of transporting the oil of the owners in the conduct of their private business, even though such owners have never held themselves out as common carriers, have never exercised or possessed and do not now possess any right of eminent domain, and derive no powers from State laws under which common carrier corporations are organized. It follows that the Act deprives such persons and corporations of their property without due process of law, and takes it for public use without just compensation.

Monongahela Navigation Co. vs. United States, 148 U. S., 312.
Weems Steamboat Co. vs. People's Co., 214 U. S., 345, 355.
Louisville and Nashville Railroad Co. vs. West Coast N. S. Co., 198 U. S., 483.
United States vs. Lynah, 188 U. S., 445.
C., B. & Q. R. Co. vs. Illinois, ex rel., Drainage Comm'rs, 200 U. S., 561.
Oregon R. R. & N. Co. vs. Fairchild, 224 U. S., 510.
Missouri Pacific R'y. vs. Nebraska, 217 U. S., 196.
Pumpelly vs. Green Bay Co., 13 Wall., 166.
Foster vs. Scott, 136 N. Y., 577.

I. To make the owners of private pipe lines common carriers as to those lines is to subject private property to a public use and is a "taking" of property within the meaning of the Fifth Amendment.

To constitute a "taking" within the meaning of the Fifth Amendment it is not necessary that the owner should be deprived of the entire possession of the property, or that the "taking" should be direct, or that there should be an actual physical appropriation of the property by the Government. It is enough if the owner be deprived of the exclusive use or free, beneficial enjoyment of his property.

In *Foster vs. Scott*, 136 N. Y., 577, the Court of Appeals of New York held unconstitutional an act providing that a landowner should not be entitled to compensation for improvements put upon his property before the taking thereof for street purposes, but after the filing of a map of the street. The Court of Appeals said, page 584 (italics ours):

> "The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution. What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against insidious approaches as an open and direct attack. *Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution.* All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. *It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the*

property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner."

L. & N. R. Co. vs. Central Stock Yards Co., 212 U. S. 132:

In this case it was held that a provision of the constitution of the State of Kentucky which was construed by the State court to require a common carrier railroad to deliver its cars to connecting carriers, without providing adequate protection for their return or compensation for their use, amounted to a *taking* of property without due process of law under the Fourteenth Amendment.

Oregon R. R. & N. Co. vs. Fairchild, 224 U. S., 510, 523:

This case involved the constitutionality of a State statute authorizing a State Railroad Commission to order railroad companies at their own cost to lay additional trackage or to make additional connections.

Mr. Justice LAMAR, at page 523, says (italics ours):

> "The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a *taking* of property, since *it compelled the defendant to expend money and prevented it from using for other purposes the land on which the tracks were to be laid.*"

Missouri Pacific Railway vs. Nebraska, 217 U. S., 196, 205:

This case involves the constitutionality of a State statute requiring railroad companies to make switch connections with grain elevators near any railroad station upon application of the owner of the elevator.

At page 205, Mr. Justice HOLMES says:

> "To require the Company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay."

In the well known case of *Pumpelly vs. Green Bay Co.*, 13 Wall., 166, 180, Mr. Justice MILLER said, at page 181 (italics ours):

> "It remains true that, where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed it, so as to effectually destroy or impair its usefulness, it is a *taking* within the meaning of the Constitution."

In *United States vs. Lynah*, 188 U. S., 445, the Government, in building a dam on the Savannah River, so overflowed the lands of an individual as to deprive them of all value, reducing the property to an "irreclaimable bog." It was held that the property had been "taken" and that compensation must be made. The Court says, at page 468:

> "Was there a taking? There was no proceeding in condemnation instituted by the government, no attempt in terms to take and appropriate the title, there was no adjudication that the fee had passed from the land owner to the government, and, if either of these be an essential element in the taking of lands within the scope of the Fifth Amendment, there was no taking."

The Court then, after referring to the case of *Pumpelly vs. Green Bay Company*, 13 Wall., 166, and other cases, says, at page 470:

> "It is clear from these authorities that, where the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done, it is of little consequence in whom the fee may be vested."

The Interstate Commerce Act, if it applies to Appellee and to other like owners of private pipe lines, will compel them to

devote their lines to carrying the oil of others, and to make large outlays for additional facilities (Statement of Facts, page 6). The Act thus deprives such owners of the exclusive use and free, beneficial enjoyment of their property, which is the essential element in private ownership. The Act, therefore "takes" the property of the pipe line owners.

II. Since the Act, as thus construed, takes private property without providing for due compensation it violates the Fifth Amendment.

In *Weems Steamboat Co. vs. People's Co.*, 214 U. S., 345, 355, Mr. Justice PECKHAM said (italics ours):

> "A private wharf on a navigable stream is thus held to be property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law, and *if necessary that it or any part of it be taken for the public use, due compensation must be made.* The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while at the same time denying its use by any one else."

In *Louisville and Nashville R. R. Co. vs. West Coast N. S. Co.*, 198 U. S., 483, a similar question arose as to the right of the owner of a private wharf to refuse to permit competitors to use the wharf.

At page 495, Mr. Justice PECKHAM said (italics ours):

> "We are of opinion that the wharf was not a public one, but that *it was a mere facility, erected by and belonging to defendant*, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, *and that defendant*

need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation."

III. The power of Congress to regulate interstate commerce, like all other powers delegated to that body, is subject to the limitations imposed by the Fifth Amendment of the Constitution.

In *Monongahela Navigation Company vs. U. S.*, 148 U. S., 312, Mr. Justice BREWER said, page 336:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment. * * * Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads, but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner or in condemnation pay just compensation therefor."

In *Gibbons vs. Ogden*, 9 Wheaton 1, at p. 196, Chief Justice MARSHALL said of the power of Congress to regulate interstate commerce (italics ours):

> "It is the power to regulate, that is to prescribe the rule by which commerce is to be governed. This power, like others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations *other than are prescribed in the Constitution.* * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a

single government *having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.*"

In *C., B. & Q. Railroad Co. vs. Illinois, ex rel., Drainage Comm'rs.*, 200 U. S., 561, Mr. Justice HARLAN said, at page 593:

> "The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the Government, Federal or State, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner."

In *Adair vs. United States*, 208 U. S., 161, Mr. Justice HARLAN said, at page 180:

> "We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons vs. Ogden*, 9 Wheat., 1, 196; *Lottery Case*, 188 U. S., 321, 353."

IV. The contention of the United States that just compensation is provided is untenable. The rates to be paid for transportation are not the compensation intended by the Fifth Amendment.

It seems to be conceded in the brief of the Solicitor General that there is "a 'taking' in the subjection to the quasi-public use as common carriers"; but it is insisted that "the thing so taken is, however, only the compensated occasional use of the pipe line" (Brief, p. 82, sub-division *b*). This can only mean that the right to charge a reasonable rate for the transportation of the oil of others is "just compensation" within the requirement of the Fifth Amendment.

This argument is based on an utterly untenable assumption that all that happens is "the compensated occasional use of the pipe line", and ignores the actual conditions which are brought into existence by the operation of the Act and the consequences which flow from them. The effect of the Act on the Appellee is a sufficient illustration of what actually happens. At the time of its passage it was an ordinary business corporation producing and dealing in crude oil, and having the exclusive use and enjoyment of the pipe lines which it had built for the needs of its own business. If the Act be valid it is compelled against its will to engage in the business of a common carrier, and its property is subjected to the *constant and permanent burden of the corresponding public use.* That is not an occasional use, but a complete and permanent transformation of the character of its property. It has to be ready at all times to take and transport the oil of others. It has to provide at its own expense the facilities for receiving the crude oil at the point of origin, wherever it may be, for pumping it through the pipes and for tanking it at the point of delivery, and an adequate system of pipes to meet the public demand and its own. It is subjected as to all of these matters to the powers and orders of the Interstate Commerce Commission. It has to accept for its service whatever rates may be fixed by the Interstate Commerce Commission or legislatively by Congress. It has to conform to the rulings in the case of *New Haven Railroad Co. vs. I. C. C.*, 200 U. S., 361, so far as applicable, in its dual relation of a dealer in crude oil and common carrier, which is a momentous result of its being deprived of the exclusive use of its own property and compelled to exercise the functions of a common carrier, and thereby subordinate the business in which it is engaged to the performance of its duties as a common carrier. The Commodities clause of the Interstate Commerce Act may be broadened to include common carriers of oil and thus compel

it to part with its pipe lines at whatever sacrifice of value or investment that may involve, or to abandon the business of producing and dealing in crude oil which it was incorporated to transact, and which is the only business in which it has ever been engaged. Thus the subjection of its pipe line facilities to a public use inevitably diminishes their value as the private property of the Appellee, and to speak of it as merely a "compensated occasional use" is far from the facts.

It is the judicial ascertainment of the impairment in values wrought, and the damage done, by the subjection of private property to a public use, and the payment of the sum so ascertained, that constitutes "just compensation" within the meaning of the constitutional requirement. What is taken from the owner is his right of exclusive control, use and enjoyment, and he is entitled to be compensated for the value of that right as judicially determined. There is no provision in this Act for such a determination or payment. Compensation for the compulsory service rendered in receiving the oil of others, pumping it through the pipes and delivering it, is an entirely different matter from compensation for the subjection of private property to a public use and the deprivation thereby of the owner's exclusive control, use and enjoyment.

It would seem to be sufficient to cite as authority on this subject the case of Monongahela Navigation Co. vs. U. S., 148 U. S. 312, pp. 336, *et seq.*

In that case it is said (p. 337):

> "Whatever be the true value of that which it takes from the individual owner must be paid to him before it can be said that just compensation for the property has been made."

In Lewis' Eminent Domain (Third Edition, Sec. 684) it is said, with a full reference to the authorities:

> "Just compensation, therefore, as used in the Constitution, means a fair and full equivalent for the loss

sustained by the taking for public use. It may be more or it may be less than the mere money value of the property actually taken. The exercise of the power being necessary for the public good and all property being held subject to its exercise when and as the public good requires it, it would be unjust to the public that it should be required to pay more than a fair indemnity for the loss he sustains by the appropriation of his property for the general good. On the other hand it would be equally unjust to the owner if he should receive less than a fair indemnity for such loss. To arrive at this fair indemnity the interests of the public and of the owner and all the circumstances of the particular appropriation should be taken into consideration."

The measure of this compensation is a judicial, and not a legislative, question.

On this subject it is said in Monongahela Navigation Co. vs. United States, *supra*, at page 327, as follows:

"The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge v. Warren Bridge*, 11 Pet., 420, 571, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do, assess the amount of

compensation to which the complainants are entitled' (See, also, the following authorities: *Commonwealth v. Pittsburgh & Connellsville Railroad*, 58 Penn. St., 26, 50; *Penn. Railroad v. Balt. & Ohio Railroad*, 60 Maryland, 263; *Isom v. Mississippi Central Railroad*, 36 Mississippi, 300).

"In the last of these cases, and on page 315, will be found these observations of the court: 'The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon the principles of natural justice or constitutional law, it seems that this must be so.'"

It must be apparent how at variance these doctrines are with the argument that the right to reasonable compensation for future services to the public in connection with the public use to which private property is subjected is "just compensation" for what is taken in depriving the owner of his exclusive use and enjoyment.

The case of Otis Co. vs. Ludlow Co., 201 U. S., 140, which is cited as authority for this strange contention on behalf of the Government, is in no way analogous. In that case it is said (p. 152):

"The principal objection made to the law is that it makes no adequate provision for payment if construed as it has been construed by the State court. There has been no substantial change in the form of this provision for the better part of a century. It reads that a person

whose land is overflowed or otherwise injured by such dam may obtain compensation therefor upon his complaint before the Supreme Court for the county where the land or any part thereof lies, but no compensation shall be awarded for damages sustained more than three years before the institution of the complaint (Pub. Stats., c. 190, § 4). The jury is to take into consideration damage to other land as well as the damage to the land overflowed. Section 14. It is to assess the damages sustained within three years, § 16, and to determine what sum, to be paid annually, would be reasonable compensation for the damages that would be occasioned thereafter, and *also a sum in gross for all damages from the use of the dam* in the manner fixed by it, § 18, the jury having power to regulate the height of the dam. Section 17. *The complainant is given an election to take the gross sum*, in which case the owner of the dam loses all benefit of the act after three months until he pays. Sections 19, 20. Otherwise the complainant has an action for the annual compensation and a lien on the dam and lands used with it. Section 21 *et seq.* And, finally, if dissatisfied with the amount of the annual compensation, he may bring a new complaint. Section 30." (Italics ours.)

Thus there was in the Act here under consideration a provision for the judicial assessment of *a sum in gross for all damages from the structure authorized by the Act which, at the election of the injured party, must be paid as a condition to the maintenance of the structure.* This vital provision is quite overlooked in the statement of the case made in the brief. If the injured party elected not to take that compensation, but preferred annual compensation, with the right of re-assessment from time to time, it would scarcely be open to him to say that there was not a provision for just compensation.

Moreover, it is only necessary to refer to the case of *Head vs. Amoskeag Mfg. Co.*, 113 U. S., 9, 23-4, 26, in which the opinion was written by Mr. Justice GRAY, to see that the Mill Act involved in the Ludlow case is sustained not really as a

" taking " of property, but as a regulation of the manner in which riparian proprietors having a common right in a stream may use and enjoy it. There is surely no analogy between the common right of riparian owners to the enjoyment of the stream and the exclusive right of the Appellee to the use of a pipe line which it has built purely for its own exclusive use in carrying on its business.

Mr. Justice GRAY said at pages 23-4:

> " The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute, for the common-law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury."

Again, at page 26, Mr. Justice GRAY said (italics ours):

> " And *by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of Pumpelly v. Green Bay Co., 13 Wall., 166.*"

In view of the reference to the Pumpelly case at page 83 of the brief for the United States, this last remark of Mr. Justice GRAY is very significant.

The Massachusetts Mill Act has recently (1908) been again considered in *Blackstone Mfg. Co. vs. Blackstone*, 200 Mass., 82. The Court says, at page 87, referring to the Mill Act:

> " It did not attempt to take property by the right of eminent domain, but to control and regulate the exercise of common rights for the common good."

And again, at page 88:

> " The nature of this legislation (the Mill Act), in reference to the purpose of its authors and to the con-

stitutional questions that arose under it, has been fully considered by the courts. Lowell v. Boston, 111 Mass., 454, 464, 467. Turner v. Nye, 154 Mass., 579, 582. Otis Co. v. Ludlow Manuf. Co., 186 Mass., 89, 95. While originally there was some doubt as to the ground upon which it could be sustained under the constitution, it is now settled by this Court and by unanimous decision of the supreme court of the United States, that the validity of the legislation does not depend upon the right of eminent domain, but upon the right of the Legislature to regulate the use of property for the best interests of the owners and of the public, when different persons have separate rights which have a common relation to certain property, such that a use of it by one owner will interfere with a like use by another owner."

The *only* point considered and decided in Clark vs. Nash, 198 U. S., 361, which is also cited, was whether the statute of a State permitting condemnation by an individual for the purpose of obtaining water for his land or for mining was or was not a condemnation for public use and it has no bearing on the subject under discussion.

The case of L. & N. R. Co. against Central Stock Yards Co., 212 U. S., 132, also cited, involved a provision in the constitution of a State requiring common carriers to deliver their cars to connecting carriers, which was held to be a taking of property without due process of law within the meaning of the Fourteenth Amendment, as there was no adequate protection for the return of the cars or compensation for their use. It is clearly an authority adverse to rather than in favor of this contention of the Government. The Court did not say that "a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment of freight in bulk in case of unreasonable refusal by a common carrier to interchange cars with another for through traffic" and obviously all that such a law could do to be valid would be to provide "full and adequate

regulations for protection from the loss or undue detention of cars and for securing due compensation for their use." The fact that compensation for use would be proper in such a case, because the only measure appropriate to a temporary use of cars, does not sustain the proposition that the subjection of a private pipe line to a public use, no relation of common carriers being involved, is validated by the right of the owner thus forcibly made a common carrier to charge reasonable rates for the service he renders as such carrier.

There is no escape from the plain proposition that an Act appropriating a private pipe line to a public use by converting it into a common carrier line must, to be valid, provide compensation to the owner for the loss sustained and damage done by depriving him of his exclusive use and enjoyment, which is quite distinct from the compensation to which he may be entitled for such service as he may render to others as a common carrier, *since that compensation is measured by the service actually rendered, in which the loss he has sustained in being deprived of his exclusive use and enjoyment is in no view an element.*

POINT THIRD.

This act cannot be sustained on the theory of the United States that the operation of private pipe lines is monopolistic, that the act prohibits their operation (save as common carriers) as an appropriate means to prevent monopolistic results, and that the adoption of this means by Congress is not within the inhibitions of the Fifth Amendment.

I. There is nothing inherent in the nature or operation of private pipe lines which causes a tendency to monopoly.

1. None of the authorities cited in the brief for the United States furnish grounds for the position of the Government on this point. No such grounds will be found in the debates in Congress or in the Report of the Commissioner of Corporations, dated May 2, 1906. It was the unified ownership or control of a great part of the pipe lines of the country, including the common carrier lines, and the supposed advantages to the old Standard Oil Company resulting from such ownership and control, that was discussed and denounced as oppressive and monopolistic. The case of the Government against the Standard Oil Company has no bearing on this subject. That case turned on the alleged monopolization or tendency to monopoly resulting from the combination in the Standard Oil Company of New Jersey, through stock ownership, of many different companies and of the control of a vast proportion of the pipe lines, refining plants and marketing facilities engaged in the pretroleum trade (*Standard Oil Co. vs. United States*, 221 U. S., 1, at pp. 70–77). That is quite different from the relation to monopolization of private pipe lines separately owned by dealers in oil or refiners for the purpose of their business. That relation is in no respect different from the relation of other privately owned property to monopolization. Such pipe lines may be misused as any other private property may be misused ; but it is none the less true that the right to their exclusive use enjoyed by their owners is the essential characteristic of private pipe lines as of all private property.

2. The brief for the United States (p. 51) quotes from the report made by the Interstate Commerce Commission (59th Congress, 2nd Session, House Document 606), in support of the position that the private operation of pipe lines tends to monopoly. It should be noted that this report was not made until January 28, 1907, so that its contents could not possibly have influenced Congress in passing the pipe line amendment. Note also that the letter transmitting the report is signed by

Commissioner Martin A. Knapp, now Judge of the Commerce Court, who wrote the prevailing opinion in these cases in the Court below. Apparently he did not regard anything in the report as a sufficient reason for sustaining the positions of the Government. The entire report, as well as the extracts therefrom quoted in the brief for the United States, at pages 51 and 52, show that the monopoly at which the report was directed was the combination of the so-called Standard Oil properties, including refineries and the whole system of pipe lines. There is nothing in the report concerning private pipe lines as such. This is shown by the following passage from page 5 of the report, only part of which is quoted in the brief for the United States, at page 51 (italics ours):

> "At the basis of the monopoly of the Standard Oil Company in the production and distribution of petroleum products rests the pipe line. *The refineries of the Standard are located in various parts of the country—upon the Atlantic seaboard, in the interior near the oil fields of Pennsylvania and Ohio, at Chicago, at Kansas City, and at various other points. These refineries are all connected with the principal oil fields and with each other by a network of pipe lines. It is possible for the Standard today to pump oil from a well in Indian Territory to its refinery in Jersey City.*"

It is curious to note, in view of what is said on this subject in the briefs for the Government,— not as determining the fact, but as showing how the question of the cost of pipe lines was regarded by the Commission, and, therefore, presumably by others during the period when the pipe line amendment was under consideration,—that the report of the Commission, at page 6, says:

> "There is nothing recondite or unusual in the construction and operation of a pipe line. Any person with sufficient capital—and the expense is not great—and with the requisite opportunity, can construct and operate those lines."

3. The cases cited in support of the position that the private operation of pipe lines tends to monopoly do not help the Government.

In *Clark vs. Nash*, 198 U. S., 361, the decision in the Utah Court was that the plaintiff, under a Utah statute, was entitled to widen and deepen defendant's ditch, and to have an easement in the enlarged ditch to the extent of such enlargement. The question raised in this Court was whether the land had been taken for a public use, or only for a private use, and it was held that the use was a public one ; but the Utah Court *awarded to the defendant damages " for injury sustained by reason of the enlargement and improvement above stated and such right of way and easement"* (p. 365), and also required the plaintiff to contribute to the cost of maintenance. It is not, therefore, correct to say, as the Government's brief says, at page 56, that plaintiff " was allowed to use his neighbor's irrigation ditch." He was only allowed to use it when it was enlarged at his expense. The reason why the plaintiff was allowed to enlarge and then use the defendant's ditch was not one of expense, but was on account of the nature of the ground—" owing to the canyon through which such ditch runs being such as only to be possible to build one ditch " (p. 365). There is obviously no parallel between this situation and that in the case at bar.

In *Strickely vs. Highland Boy Gold Mining Co.*, 200 U. S., 527, the facts were very similar. It was shown to be necessary for the plaintiff's aerial bucket line to cross the defendant's mining claim, on account of the nature of the land ; not because of the expense. The main point under consideration was whether the use was a public or private one. The plaintiff, the owner of the aerial bucket line, *had paid into Court the value of the right of way.* There was thus no question such as we have here under the Fifth Amendment, nor did the necessity under which the plaintiff in that case was to cross the

land have any relation to the situation in the case at bar, where there is nothing to prevent other pipe lines being built.

4. At various points in the brief for the United States, occur such words as "duress" and "oppression," in such a connection as to imply that the owners of private pipe lines use them as instruments of duress and oppression. At page 43, that brief says:

> "The Government may always intervene to prevent an economic advantage from being made the instrument of oppression."

Similar expressions occur in the brief of the Commission. It is impossible, in the limited space available, to critize separately each such expression. It is enough to say that they are purely rhetorical, having no support whatever in the record; nor is there even in any of the publications referred to in the brief for the Government anything to support such charges. Had there been any foundation for such charges, the Government would certainly have produced affidavits from those having personal knowledge, and have read them on the hearing of this motion in the Commerce Court, so as to make them a part of the record. That they made no attempt to do so is sufficient proof of the correctness of our denial. In fact, the Government confuses the lawful advantages of private property with the use of such property as a means of oppression. The failure to make this distinction invalidates much of the arguments in the Government briefs.

A number of cases on the brief for the United States, cited in support of the right of the Government to intervene to prevent "oppression" and wrong doing are entirely irrelevant, because there are in the cases at bar no facts similar to those in the cited cases referred to. Thus, in *Waters-Pierce Oil Co. vs. Texas*, 212 U. S., 86, 98, the action was brought under a statute prohibiting the combination between two corporations

whereby the price in Texas of any article should be fixed or would be reasonably calculated to be fixed, or controlled, &c.

In *Central Lumber Co. vs. South Dakota*, 206 U. S., 157, the plaintiff in error had been convicted under a statute making it a crime for a dealer in any commodity "*intentionally and for the purpose of destroying competition of any regularly established dealer in such commodity*" to discriminate between different sections of the State, by selling that commodity at a lower rate in one section than in another. (Italics ours).

The cases of *Knoxville Iron Co. vs. Harbison*, 183 U. S., 13; *Patterson vs. Bark Eudora*, 190 U. S., 169; *Mutual Loan Co. vs. Martell*, 222 U. S., 225; and *Opinion of the Justices*, 163 Mass., 589, are all cases where certain contracts were forbidden to be made by *persons in an assumed helpless position*, such as seamen, who were at the mercy of oppressive employers. In every one of the cases there were facts showing actual wrong doing, and not a mere "economic position" which gave the employer "an unfair advantage over his employees,"—as stated on page 44 of the brief for the United States.

Similarly, the Act in *Mueller vs. Oregon*, 208 U. S., 412, was sustained because "the physical well-being of woman becomes an object of public interest and care, in order to preserve the strength and vigor of the race" (208 U. S., 421). In *Holden vs. Hardy*, 169 U. S., 366, the statute was sustained on the general ground that, for the health and welfare of the community, *persons engaged in dangerous or unhealthy employment*, such as mining, have been found to be in need of special protection. In both these cases the statute abridged the hours of labor of the persons affected.

All the foregoing cases were really decided under the police power, and have not the slightest analogy to the situation of the Appellee as it is disclosed in this record and as it is in fact.

5. *The mere extent of acquisition of business or property achieved by fair and lawful means or commercial dominance fairly resulting from the ownership of private property lawfully obtained is not the criterion of monopoly or monopolization, within the legal meaning of those words. Monopolization is the unlawful exclusion of others from opportunities and privileges which are rightfully theirs. Monopoly, in the legal sense, is the condition resulting from monopolization thus defined.*

Standard Oil Co. vs. United States, 221 U. S., pp. 51, 61, 76.

United States vs. Reading Company, 183 Fed., 427.

United States vs. Standard Oil Co., 173 Fed., 177, 191.

Opinion of KNAPP, P. J., in court below, Record, pp. 124–7.

In *United States vs. Reading Company*, 183 Fed., 427 (C. C. A., 3rd Circuit), GRAY, Circuit Judge, said at page 456:

> "It will suffice to say that the mere extent of acquisition of business or property achieved by fair or lawful means cannot be the criterion of monopoly. In addition to acquisition and acquirement, there must be an intent by unlawful means to exclude others from the same traffic or business or from acquiring by the same means property and material things."

The private use of private property, including private pipe lines, although it excludes others from its use and the opportunities and benefits which its use might afford them, is not monopolization; because the opportunities and benefits from which they are excluded are not rightfully theirs, and the exclusion is incidental to the rightful use of private property. The fact—if it be a fact—that oil producers in some districts may have no practical market except that afforded by the owners of private pipe lines has no relation to monopoly, because such producers are denied no privilege or opportunity which is rightfully theirs. The

same is true of refiners who would like to use the private pipe lines of others for a more convenient supply of their crude oil. If private enterprise fail in such instances to provide them with a common carrier pipe line as a means to a wider market or supply, or the Government fail to cause such lines to be constructed, or to take private pipe lines for public use under the power of eminent domain, there does not arise out of those conditions a right in those producers to use the private property of others, nor would the denial of such use by its owners constitute monopolistic exclusion. Under all the circumstances and conditions of business life, the private use of private property may be and is the means of commercial advantages in all degrees, and when that is its natural and normal effect, it is not monopolizing, nor has it any relation to monopoly, nor may it be legislated against as tending to monopoly. To speak of such conditions as an obstacle to interstate commerce is a misuse of language and confusion of ideas.

There could be no better statement of this point than that by KNAPP, P. J., in his opinion in the court below (Record, p. 124–7):

> " We have searched the decisions in vain for any definition of monopoly, any statement of its elements or description of its characteristics, which would include or apply to the activities of these petitioners and similar pipe line owners. In the absence of some contract or combination between competitors, some mutual agreement or understanding which has in view or actually results in restricting competitive freedom, all of which are here wanting, it would seem that monopoly by a single individual must consist of or be effected by some acts or series of acts or continued course of dealing which operates to deprive others of privileges or opportunities which rightfully belong to them and which they would otherwise enjoy. But how does the possession of a private pipe line by one of many oil producers or dealers take from the others any privilege or opportunity which is rightfully theirs or which they are

justly entitled to share with the more fortunate owner? Of what right can they be said to be deprived, or in what respect are they subjected to any injury or disability which is illegal?

"True, the possession of a pipe line enables its owner to transport his oil to the refinery or other market at very small cost compared with any other means of conveyance. The practical result may be, and in most instances doubtless would be, that other producers find it to their interest to sell the output of their wells to the owner of the pipe line, and in this sense it may be said that they are obliged to sell to him. Granted that his pipe line gives him such command that he is able to control or even fix the selling price of the crude article in that particular field or territory, upon what sustainable theory can it be claimed that other producers are deprived of anything which rightfully belongs to them because they do not or cannot provide themselves with the same means of reaching the market? And upon what conception of constitutional rights can it be contended that Congress has the power to transform this private pipe line into a public facility and require its owner to become a common carrier? If this can be done, if a mere act of legislation can change the legal status of his property from private to public and compel him against his will to devote that property to public use, with all the burdens and obligations which he must thereby assume, is not the Fifth Amendment as to him shorn of its vitality and its protective power reduced to a shadow?

In the nature of things, one who owns private property of substantial value has an advantage over those not fortunate enough to have similar possessions, and this advantage ranges through all degrees. It frequently results in commercial dominance of precisely the same sort and quite as complete as the alleged monopoly here considered. But the advantage so acquired, whatever its degree, is not monopolistic, nor are we able to see that it has any tendency, much less an inevitable tendency to bring about the conditions which constitute an

> unlawful monopoly, except upon the socialistic theory that all private ownership is indefensible and that everything should be held in common. The simplest conception of private property implies possession which is exclusive and enjoyment from which others may be debarred ; it cannot otherwise be *private*. The advantage which comes from its legitimate use is a necessary incident of private ownership, and it is a misuse of terms to say that this advantage tends to monopoly. Although the private use of private property excludes others from the benefits and opportunities which the owner enjoys, and which might accrue to others if they shared in that use, yet this is not monopolization, whatever its indirect consequences, because those who are excluded have no rightful claim to that which belongs to the owner himself."

If the meaning and limitations of the words " monopoly " and " monopolization," in their legal sense, are as above set forth, then the entire argument of the Government falls to the ground ; for there is no charge nor even a suggestion that the appellees have actually been or ever were guilty of unlawful exclusion ; and this Court will hardly listen to a charge that the lawful business of an innocent person, conducted without wrong to anyone, has an inevitable tendency to such unlawful exclusion.

It is hardly necessary to point out that the Federal Government possesses the power of eminent domain in its broadest form, and that it might, if so directed by Congress, condemn the pipe lines of the Appellee, making due compensation therefor.

Kohl vs. United States, 91 U. S., 367.
United States vs. Gettysburg Electric Railway Co., 160 U. S., 66[2].

So, also, Congress may exercise the right of eminent domain through a corporation created by it instead of by a direct proceeding in the name of the United States.

Cherokee Nation vs. Southern Kansas Railway Co., 135 U. S., 641.
Luxton vs. North River Bridge Co., 153 U. S., 525

If, therefore, it was necessary to have the Appellee's private pipe lines devoted to a public use, Congress could either have condemned them or have granted to a new corporation the right of condemnation, in either case making proper compensation to the owner.

II. It follows therefore that the Act, even regarded as an act prohibiting the operation of pipe lines, save as common carriers, cannot be sustained as an appropriate means to prevent monopoly, because there is no real and substantial relation between what the Act ordains and monopoly.

1. The Act itself says nothing about monopolization or monopoly. The prevention of monopoly is not, therefore, its avowed purpose. Indeed no legislation was necessary to prevent monopolization by pipe lines, because monopolization of any business in whole or in part by any means or agency whatsoever is denounced by the Sherman Act. But though this be true, let us assume, for the sake of this argument, that the intent of Congress in enacting the pipe line amendment was to strike at monopoly. What, then, is the province of this Court in its consideration of the amendment? It is that defined by this Court in *Minnesota vs. Barber*, 136 U. S., at page 320:

> "Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects, and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

In *C., B. & Q. Ry. vs. Drainage Commrs.*, 200 U. S., 561, at p. 593, it was said:

"If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

In *Adair vs. United States*, 208 U. S., 161, at pages 179–180, it was said:

"Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge the employee because of such membership on his part.

* * * * * *

"It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment and as not embraced by nor within the power of Congress to regulate interstate commerce, but under the guise of regulating interstate commerce and as applied to this case it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair."

In *Lawton vs. Steele*, 152 U. S., 133, it is said (p. 137):

"To justify the State in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference, and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public

interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the Courts."

In *Lochner vs. New York*, 198 U. S., 45, it was said, at page 57:

> "It is a question of which of two powers or rights shall prevail—the power of a State to legislate, or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

2. Hence this Court has to determine for itself whether there is a real and substantial relation between the assumed object of the Act (the prevention of monopolization) and the means it employs (depriving the owners of private pipe lines of the exclusive use and enjoyment of those lines in their own businesses); and whether those means are arbitrary, unreasonable, or beyond the necessities of the case. There is no such relation, unless the operation of a private pipe line of that character, in the nature of things, tends to monopolization, and unless that fact would justify a "taking" of property without just compensation, both of which we dispute.

3. But the Government's argument involves the assumption that Congress, by the pipe line amendment, undertook to prohibit the owners of private pipe lines from using them to transport the oil of such owners across state lines, unless such owners should submit also to carry oil for the public; and that the amendment requires the owner to elect whether

he will become such a public carrier or will abandon the interstate transportation of his own oil.

There is no ground for this assumption.

At the time of the passage of the pipe line amendment in 1906, various persons and corporations owned private pipe lines, which they were using for the purpose of their own businesses, whether as producers, dealers or refiners. Under the law of the land, they had provided themselves with the property thus affected as one of the means of carrying on legitimate businesses. Engaged in this business with their own plants and property, they find themselves all at once under the Act and required either to carry the oil of others in their pipes as common carriers or to abandon their businesses. It is a mockery to say that, in such a case, any election is open to the owner. May it be said that a man has an election when the alternative is the destruction of his business, property and investment? Is it arguable that such an election is within the contemplation of the Act? And how would the situation complained of be helped by the abandonment of the pipe lines, which would mean not only ruin to their owners and to producers and refiners, but injury to a vast number of consumers? Clearly the only sensible view of the amendment (if it applies to private pipe lines at all), is that it contemplated that such pipe lines would necessarily be continued in operation and would thenceforth be, by its terms, subjected to public use. It is the "necessary or natural" operation of the Act which governs (*Minnesota vs. Barber*, 136 U. S., 313, at p. 320). There is not in the pipe line amendment any prohibition of the use of the lines for the transportation of the oil of their owners. There is not a prohibitive phrase in the amendment. We have to take it just as it is, if construed to apply to private pipe lines—*the forcible subjection to a public use of private pipe lines in operation, and which, in the nature of things, must continue in operation.* That is the effect of the Act with which we have to deal and

by which its validity has to be judged. And no one has any warrant for saying that Congress would have prohibited the use of these lines as private lines if it had realized that it had no power forcibly to make them common carriers.

III. The assumed prohibition and requirement to elect, if present in the Act, would be unconstitutional.

1. The right to carry goods from one State to another is not a franchise to be granted or withheld by Congress at its pleasure. It is an inherent right of the citizen "that springs from the nature and necessities of social order" (Opinion of KNAPP, P. J., Record, p. 115), though, like other rights, subject in its exercise to valid regulations imposed by law.

> "It has been said that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right and gave to Congress the power to regulate it." (*Gibbons vs. Ogden*, 9 Wheaton, 1, at page 211.)

In *Employers' Liability Cases*, 207 U. S., 463, Mr. Chief Justice WHITE, with respect to the contention that one who engages in interstate commerce submits all his business concerns to the regulating power of Congress, said, at page 502 (italics ours):

> "*It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress.*"

2. The act, as construed by the Government, violates the due process clause.

This necessarily follows from a consideration of the facts and arguments already set forth in this brief unless the case at bar is, in some way, taken out from under the general rule, which, we submit, has not been done. In their effort to avoid the effects of well established constitutional limitations, counsel for the Government have relied upon the rulings of numerous cases, none of which help their contention under this point.

(*a*) Some of them involve the prohibition of transportation in interstate commerce or the sale or manufacture within a State of *some noxious tangible thing* which is injurious to the public morals, the public health, or the public safety. These decisions are addressed to the misuse of commerce.

The Lottery Cases, 188 U. S., 321.

United States vs. Hoke, 227 U. S., 308;
Bennett vs. United States, 227 U. S., 333;
White Slave Cases.

Hipolite Egg Co. vs. United States, 220 U. S., 45;
United States vs. Morgan, 222 U. S., 274.
Pure Food Cases.

Powell vs. Pennsylvania, 127 U. S., 678.
Oleomargarine Case.

Mugler vs. Kansas, 123 U. S., 623.
Sale or Manufacture of Liquor.

There is no analogy between any of these cases and the case as bar, where the thing which the Government asserts to be prohibited is not tangible property, but is the *intangible exclusive right* to carry innocent private property, lawfully acquired, through a private conduit in the course of a lawful business.

The Government's case is not helped by the claim that prohibition of operation is not a "taking" but merely the prohibition of a noxious agency.

The entire argument of the Government under this head may be summed up in a single sentence: "The Act," says the Government's brief, "does not take private property for public use; it regulates the use of private property so as to prevent the abuse of it and impliedly prohibits its noxious use." Now what is this noxious use of private pipe lines that is supposed to be prohibited? It is not the use of the lines for the transportation of oil—there is nothing noxious about that. It is not even the use of the pipe lines by their owners for the transportation of their own oil. That is still regarded as innocent. The noxious use condemned is exclusive use by the owners; in other words, the noxious use of the pipe lines which is prohibited is the failure of the owners to give the public the use of them. The distinction which the Government seeks to draw between a taking for public use, which is prohibited by the Constitution unless compensation be made, and the prohibition of use which it finds in this Act, is the distinction between the taking of property for a public use and the prohibition of any other use; that is to say, between a taking of property for public use and a requirement that the owners shall devote it to public use. This is a distinction without a difference. The obvious purpose of the act is not to prevent the evil use of the pipe lines by their owners but to give others the benefit of their use.

Another group of cases cited in the brief of the United States, at page 80, are cases sustaining the police power of the State exercised for the purpose of suppressing some serious moral evil, or something highly prejudicial to health.

Austin vs. Tennessee, 179 U. S., 343.
(Cigarettes.)

Jacobson vs. Massachusetts, 197 U. S., 11.
(Compulsory Vaccination.)

Purity Extract Co. vs. Lynch, 226 U. S., 192.
(Intoxicating liquors.)

Booth vs. Illinois, 184 U. S., 425.
(Gambling in futures.)

Lemieux vs. Young, Trustee, 211 U. S., 489.
(Fraudulent insolvencies.)

Silz vs. Hesterberg, 211 U. S., 31.
(Violation of Game Laws.)

The Slaughter House Cases, 16 Wall., 36.
(Sale of bad beef and nuisance of slaughter houses.)

There is obviously no likeness between any of these cases and the case at bar.

(*b*) Another class of cases sustains the power of a State to prevent the waste of natural gas, oil or water in subterranean reservoirs by appropriate regulation. In these cases, it is held that the title of any one owner is not complete until the gas, oil or water is reduced to possession, and that the acts of owners affecting the gas, oil or water, while subject to the common right, may be regulated for proper purposes by the State. None of these cases in any way affect the questions involved in the case at bar.

Ohio Oil Co. vs. Indiana, 177 U. S., 190.
Manufacturers' Gas, &c., Co. vs. Indiana Nat. Gas Co., 155 Ind., 461.
Lindsley vs. Nat. Carbonic Gas Co., 220 U. S., 61.
Oklahoma vs. Kansas Nat. Gas Co., 221 U. S., 229.
Forbell vs. City of N. Y., 164 N. Y., 522.

In the case of *Oklahoma vs. Kansas Nat. Gas Co., supra*, the point involved was as to the right of the State of Oklahoma to prohibit the exportation from that State of natural gas mined within the State; and this Court held that the State had no such right. In the course of the opinion, however, Mr. Justice McKenna reviews *Ohio Oil Co. vs. Indiana, supra*, and *Lindsley vs. Nat. Carbonic Gas Co., supra*, and a number

of similar cases. The above analysis is sustained by this review of them. Thus, at page 252, he says, concerning *Ohio Oil Co. vs. Indiana:*

> "The case is a valuable one and clearly announces the right of an owner to the soil beneath it and the relation of his rights to all other owners of the surface of the soil. The right of taking the gas, it was said, was common to all owners of the surface, and because of such a common right in all land owners an unlimited use (against a wasteful use the statute was directed) by any it was competent for the State to prohibit. This limitation upon the surface owners of property was justified by the peculiar character of gas and oil, they having the power of self-transmission, and that therefore to preserve an equal right in all surface owners there could not be an unlimited right in any."

As to the *Lindsley* case, being to the same effect as the *Ohio Oil Company* case, he says:

> "Indeed, they can be said to be identical in principle. In the one case, oil and gas, in the other mineral water and gas, were commingled beneath the surface of the earth and capable of movement and common ownership. In the one case, the right was asserted to waste the gas to secure the oil, which was the more valuable of the two; in the other case, the right was asserted to waste the water to secure the gas as the more valuable of the two. In both cases, there was a statute forbidding the waste. Speaking of the purpose of the statute in *Lindsley vs. Nat. Carbonic Gas Co.*, it was said: 'It is to prevent or avoid the injury and waste suggested that the statute was adopted.'"

(c) Another class of cases present miscellaneous instances of regulation.

Noble State Bank vs. Haskell, 219 U. S., 104.
Engel vs. O'Malley, 219 U. S., 128.
United States vs. D. & H. Co., 213 U. S., 366, 415.

Louisville and Nashville R. R. Co. vs. Mottley, 219 U. S., 467.
Armour Packing Co. vs. U. S., 209 U. S., 56.
United States vs. Lehigh Valley R. Co., 220 U. S., 257.
Southern Ry. vs. Reid, 222 U. S., 424, 438.
Atlantic Coast Line vs. Riverside Mills, 219 U. S., 186.
Norfolk & Western Ry. Co. vs. Dixie Tobacco Co., 228 U. S., 593.

Much emphasis is laid by the learned Solicitor General upon the case of *Noble State Bank vs. Haskell, supra.* As to that case it may be said that the business of banking has, for nearly a century in this country, been regarded as one which depended upon the permission of the Government or one which the legislative power might prohibit except upon conditions. In New York State a provision somewhat similar to that required by the Oklahoma law in the *Haskell Case* was a part of the banking law as early as the year 1829 (*People vs. Walker*, 17 N. Y., 502). The foundation of the ruling is in the fact that the banking business is of such a character, owing to the reasons stated which are peculiar to it (page 111), that a very broad power of State regulation is justified, even to the extent of warranting the State in taking the whole of the business under its control, either with respect to regulation or prohibition. No such theory with reference to the private transportation of privately owned property from one place to another in the conduct of a legitimate business is tenable; nor can the forcible subjection of these private pipe lines to a public use be deemed "a comparatively insignificant taking of private property" (*Haskell* case, p. 110).

Similar remarks may be made as to *Engel vs. O'Malley, supra.*

The other cases cited in this subdivision are those in which a common carrier railroad company has been prohibited from

doing, or has been required to do, something for the purpose of ensuring uniformity of rates and the impartial treatment of all shippers, or else they are cases where a common carrier who has received goods for transportation to another state, has been required to assume liability for the goods to their destination.

The case of *United States vs. Del. & Hudson Co., supra*, involved the so-called "Commodities Clause" of the Interstate Commerce Act, which absolutely and unequivocally prohibits a railroad company from transporting or dealing in any article which it owns or in which it may have an interest. That clause, as construed by this Court, was sustained as a valid regulation of railroad companies, which are common carriers in the most complete sense of the term. The case is authority for simply this proposition;—it being a valid regulation of interstate common carriers to require of them uniformity of rates and to prohibit discrimination and rebates, it follows that it is also a valid regulation to prevent such a carrier from impairing the efficiency of its paramount obligation as a common carrier by the use for its own purposes of its railroad, which it has dedicated to a public use. There is no analogy between a regulation limited to such conditions and a regulation or prohibition respecting purely private property, like the private pipe lines involved in the case at bar.

The case of *U. S. vs. Lehigh Valley R. Co., supra*, is a corollary to *U. S. vs. Del. & Hudson Co.*, holding that where the railroad carrier owns a controlling interest in the stock of another corporation whose property it transports, the question whether the carrier is really to be considered the owner of the property is a question of fact.

The case of *Louisville & Nashville R. R. Co. vs. Mottley, supra*, rests upon a similar principle to that governing the *Commodities* case. Congress having the right to compel uniformity of rates by common carrier railroads, and, in pursuance of such right, having declared that no free

passes shall be issued, and it being now accepted that this power of Congress existed from the beginning and therefore antedated any possible contract made by the railroad company, it follows logically that a pass granted in the manner described in the *Mottley* case became void as soon as Congress had legislated on the subject. In this case, as well as in the *Commodities* case, the action taken was to prevent discrimination on the part of railroads or to secure uniformity of rates. What has been said about the Mottley case applies equally to *Armour Packing Co. vs. U. S.*, 209 U. S., 56.

In *Atlantic Coast Line vs. Riverside Mills*, *supra*, and *Norfolk & Western Ry. Co. vs. Dixie Tobacco Co.*, *supra*, railroad carriers, which had voluntarily received freight for transportation to a point in another state beyond their own terminals, were required to assume liability for the goods to their destination, and to make carriers beyond their own terminals their agents and not the agents of the shipper. This was sustained as a reasonable regulation of interstate commerce. Mr. Justice LURTON, in the Atlantic Coast Line case (219 U. S., 186), said at page 206:

> "In substance, Congress has said to such carriers (meaning common carriers), 'If you receive articles for transportation from a point in one State to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents and not as agents of the shipper.'"

In *Norfolk & W. Rway. Co. vs. Dixie Tobacco Co.*, *supra*, at page 596, Mr. Justice HOLMES, referring to the Atlantic Coast Line Case, *supra*, and to the case of *Galveston, H. & S. Rway. Co. vs. Wallace*, 223 U. S., 481, said:

> "In the second case, a carrier is spoken of as voluntarily accepting goods for a point beyond its line;

> but, there too, there was the same attempt to limit liability, and, in the present case, the acceptance was voluntary in the same degree as in that. There is no substantial distinction between the earlier decisions and this."

These cases, involving regulations of common carriers with respect to freight which they voluntarily undertake to carry, cannot possibly have any bearing upon the power of Congress to convert into common carriers companies like the Appellee which are operating private pipe lines as facilities of their own lawful business and which have never carried nor held themselves out to carry for others.

(d) Several of the cases involved the right of the Government to compel the uncompensated removal of unreasonable physical obstructions, such as a bridge, from an actual navigable river.

> *Union Bridge Co. vs. United States*, 204 U. S., 364.
> *Monongahela Bridge Co. vs. United States*, 216 U. S., 177.
> *C., B. & Q. Ry. Co. vs. Drainage Commrs.*, 200 U. S., 561.

The general principle on which these cases rest is expressed in the *Union Bridge Co. Case, supra*, at page 401, as follows :

> "Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a waterway of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation should be made."

In all this group of cases it may fairly be assumed, as stated by Mr. Justice HARLAN, in the *Monongahela Bridge Co. Case, supra*, at page 193, that the bridge or other obstruction

was constructed or put in place with the knowledge that Congress or the State legislature might some day order its removal as an unreasonable obstruction to navigable waters.

In other words, the fundamental doctrine of these cases is that any structure in a navigable river is built and maintained subject to the paramount power of Congress or the State to compel its removal or alteration whenever it interferes with the public rights in the river.

3. Every case of the exercise of the legislative or so-called police power with respect to the regulation of a business, public, private or "affected with a public interest," is to be judged by its own circumstances. It is not usually the underlying principle governing that power which is in doubt; but its application to any particular state of facts. Hence the authority of any case involving its exercise is, generally speaking, confined to the circumstances and conditions it involved. For instance, the *Haskell* case is governed by the nature of the banking business, which furnishes "the only available means for keeping money on hand" and to which checks, circulating as a form of current funds, are an incident. So also the oil and gas legislation rests on the peculiar conditions they present, as does the regulation of some of the activities of common carriers. No one questions the general principle that the police power extends to the regulation of business for some purposes, and a multitude of cases could always be cited involving instances of its exercise. But the validity of any particular exercise of the power is another matter. It has to be judged on its own circumstances and conditions. We have an instance of one before us, so the Government asserts. A dealer in crude oil finds it necessary to provide itself with its own pipe lines to make deliveries to its customers. Its business is buying and selling oil. One can easily imagine valid regulations under the police power of the methods of conducting that business. The question is whether the Act under

consideration is such a regulation. It affects the pipe lines so provided by the dealers a facility for getting its oil to its customers at the least cost. Anyone else may do the same. Let it be granted that the facility is an advantage. Congress steps in and says that any one having oil to transport may have it transported by this private facility. Is that a regulation of the business of the dealer? It is not engaged in the transportation of oil for others with that facility or otherwise. The Act does not assume to prescribe any change in its method of transporting its own oil. It simply says that it may go on transporting its own oil as before but that it must, in addition, transport the oil of others as a common carrier. Instead of the Act being a regulation of the Company's existing business under the police power is it not the creation of a new business and an appropriation of property for the compulsory service to be so rendered to others? It would seem that there can be no doubt how that question must be answered. That is the question this case presents, and we submit that it is not a case of regulation under the police power; that it is a case of a "taking" of property pure and simple; and that there is not a case cited in the opposing briefs which sustains, either directly or by analogy, the contention that it is a legitimate exercise of the police power as a regulation of business.

IV. No light is thrown on the discussion by reference to the debates, even if such reference be permissible.

1. The Government claims that the debates of Congress may be referred to, to ascertain the intention of Congress in passing the pipe line amendment; that these debates show that the evil aimed at was the prevention of the supposed monopolization or tendency to monopolize, growing out of the existence and operation of private pipe lines; and

that the passage of the amendment was a valid regulation for the prevention of the evil thus aimed at. Believing that reference to the debates of Congress for the purpose claimed by the Government can only lead to confusion, we deem it unnecessary to enter into any very extended discussion of what those debates show, but content ourselves with only a brief reply to the Government's contention in this behalf.

One source of confusion in the debates should be borne in mind, namely, that there were two amendments under consideration; one being the pipe line amendment which was adopted and embodied in Section 1, and the other the "commodities" amendment, by which it was at first proposed to apply the principle of the Commodities Act to all carriers, including pipe lines.

The only report of the Bureau of Corporations on the Transportation of Petroleum which was before Congress during the debate on this amendment was the first report, dated May 2, 1906. Neither in this report, nor in the summary prefixed to it, nor in the message of President Roosevelt transmitting the summary to Congress is there any support for the position, as claimed by the Government, that "the evil aimed at was the refusal of owners of private pipe lines to carry for the public." The message and the summary are mainly confined to the discussion of alleged railroad abuses, and the report itself, though it contains a considerable number of casual allusions to pipe lines, only once or twice uses the word "monopoly" in connection with pipe lines, and makes no statement from which it could be argued that the writer of the report supposed that the alleged monopolization of the oil industry was due to the ownership or operation of private pipe lines, as that term is here used, or indeed of pipe lines in general. It was not until a later report of May 20, 1907, that the alleged monopolization growing out of the control of pipe lines by the Standard Oil Company was seri-

ously discussed. The words "*monopoly* of the pipe lines in the United States" quoted from page 37 of the first Report at page 21 of brief for the United States meant, as the context shows, the ownership of *nearly all* the pipe lines, not a monopoly of interstate commerce.

As to the debates themselves, it is impossible to point to any theory concerning the status of pipe lines which can be said to have been generally adopted by the members of either house of Congress. As far as concerns the promoters of the amendment and those who may be considered to have taken any responsible part in the discussion, the debates appear to show, as already stated, that there were but two kinds of pipe line companies under consideration, the first being those which were actually and admittedly common carriers, and the second those which were engaged in the business of transportation and were organized under public laws giving them the right of eminent domain, but which (it was charged) refused to carry oil except for themselves or for favored shippers. Pipe line companies of this latter class are, at various points in the debate, spoken of as if they were "*private*" pipe lines.

This distinction appears from the remarks made by Senator Foraker and other senators, in the Senate debate, shortly after the extract quoted from Senator Foraker's remarks, on page 21 of the brief for the United States, and prior to the quotation from Senator Nelson, on page 22, of the same brief. Senator Foraker was talking about a natural gas company, of which he said (40 Cong. Rec., p. 6361):

> "That is a purely private matter; *they are not piping gas for the public* and it seems to me that they ought not to be put under this proposed law. We have no right to put them under it."

A little later Senator Mallory inquired whether the pipe lines to which Senator Foraker referred "act on the theory of being public servants to condemn property under the right of eminent domain." Then follows this colloquy:

"MR. MALLORY: I did not understand the Senator to answer the question exactly as I put it, which is: Do they exercise the right of eminent domain on the theory of being public servants?

"MR. FORAKER: *They do. They are allowed to exercise the power of eminent domain, and they are, by the terms of the statute, called 'common carriers' for that reason.* They are supposed to be wholly within the State of Ohio, I suppose, so far as the statute contemplates, but *a pipe line of that kind is not contemplated to be used as a common carrier, but simply for a specific, private, individual purpose,* in the sense that it belongs only to one company."

* * * * * *

"MR. FORAKER: I don't want it (*i. e.*, the Foraker amendment) to go over if we can agree upon it now. I do not understand why the Senator should object to putting in the words 'carrying for the public' if a party be not engaged in carrying for the public only, but in carrying his own."

Again, at page 6362:

"MR. MCCUMBER: I hope the Senator will explain the necessity of making a public matter out of these concerns which are purely for private use. * * * But, even *if it be granted that you may consider that the law gives them the right to condemn lands for their particular purpose, that of itself does not make them a public carrier,* unless, in the law or in their articles of incorporation, there is something authorizing them to carry for the public.

MR. FULTON: Can they obtain the right to exercise the power of eminent domain, unless they are engaged in a public purpose?

MR. MCCUMBER: That will be determined by the laws of the State. That is not the real question. *The question is whether any of them are engaged as public carriers of particular commodities.*"

* * * * * *

Quite clearly, Senators Foraker, Mallory and McCumber at least were talking about pipe line companies which had the right of eminent domain and were therefore in law under the duty to act as common carriers, but were not in fact carrying for the public. If reference be made to the debate at all, the whole of pages 6361 to 6366 should be carefully read. We believe it will appear that Senator Nelson's remarks also, on page 6365 (quoted at page 22 of the brief for the United States) had reference to the same kind of pipe line company and not to what is here under consideration as a private pipe line, and that the same idea possessed the minds of many Senators (including Senator Lodge) throughout the debate. See the quotations from Senator Lodge at pages 9, 10 of this brief.

Note further that the Eureka Pipe Line, mentioned on page 26 of the brief for the United States, was in fact a common carrier, and that the Pure Oil Company, mentioned at pages 24 and 27 of the same brief, owned and operated the United States Pipe Line, which was and is a common carrier (see Brief for United States, p. 64 ; Brief for Commission, p. 86). Yet the quotations from the debate referring to these pipe lines are cited by the Government as if they referred to companies operating private pipe lines.

2. If there be in the debates (which we do not concede) anything to show certainly that other senators than those above referred to had any clear conception of what we now mean by a private pipe line (which is a pipe line incidental to the private business of its owner), that simply illustrates the confusion of thought characteristic of public debates, and shows how futile it usually is to attempt to ascertain the purpose of Congress as a legislative body from the conflicting remarks of members who too often speak with little preparation and without full knowledge of the subject.

3. So far as any monopoly is concerned, the language of the debates, in numberless instances, does show that the monopoly discussed and aimed at was a monopoly charged on the old

Standard Oil organization in its entirety, including its great network of pipe lines and its refineries and selling facilities, and not a monopoly having any relation to the ownership and operation of individual pipe lines, much less when these were private pipe lines as that term is here used. And this appears clearly from various extracts from the debates quoted in the Government briefs (Brief for United States, p. 29; brief for Commission, pp. 73–4, 78, 80–1, 84–5).

POINT FOURTH.

The Act cannot be sustained, as contended on behalf of the Interstate Commerce Commission, by resorting to the doctrine of the Elevator and Stockyard cases, because, as applied to private pipe lines, the Act does not regulate a business affected with a public interest in the sense of those cases.

Munn vs. Illinois, 94 U. S., 113, 126.
People vs. Budd, 117 N. Y., 1.
Budd vs. New York, 143 U. S., 517.
Brass vs. North Dakota, 153 U. S., 391.
Cotting vs. Kansas City Stock Yards, 183 U. S., 79.
Ratcliff vs. Stock Yards, 74 Kansas, 1.
Cargill vs. Minnesota, 180 U. S., 452.

This subject is really covered by subdivision III. of the last preceding Point, pages 49–59; but as it is elaborately discussed in the brief for the Commission, we think it proper to state what the doctrine of those cases really is.

In the *Munn* and *Budd* cases the defendants were carrying on the business of elevating, storing and delivering grain for the public, and the legislation involved prescribed the charges for this service.

In *Cotting vs. Kansas City Stockyards, supra*, though the

statute in question was held unconstitutional, because it was made to apply to the plaintiff corporation only, yet the general doctrine was discussed and its scope was thus stated (p. 91), by Mr. Justice BREWER (italics ours) :

> " In the light of these quotations, this may be affirmed to be the present scope of the decisions of this Court in respect to the power of the legislature in regulating rates: *As to those individuals and corporations who have devoted their property to a use in which the public has an interest*, although not engaged in a work of a confessedly public character, there has been no further ruling than that the State may prescribe and enforce reasonable charges."

In that case, the plaintiffs were conducting a stockyard in which were received the cattle of dealers generally, and the complaint was that the rates required by the statute were ruinously small. The facts in *Ratcliff vs. The Stockyards, supra*, were similar.

In *Brass vs. North Dakota, supra*, the Court was considering a statute of North Dakota, which provided in substance that all elevators and warehouses erected and operated for the purpose of handling grain for profit should be public warehouses.

Referring to this statute, Mr. Justice SHIRAS, at page 404, says (italics ours) :

> " We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. *Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit.*"

In *Munn vs. Illinois*, at page 133, Mr. Chief-Justice WAITE said (italics ours) :

> " There is no attempt to compel these owners to grant the public an interest in their property, but to

declare their obligations, *if they use it in this particular manner.*"

In *Weems Steamboat Co. vs. People's Co.*, 214 U. S., 345, the Court said, 356 (italics ours):

> "The case of *Munn v. Illinois*, 94 U. S., 113, 127, has, in our judgment, no bearing upon the question before us. In that case and in those cited therein the discussion was in regard to the right of owners of property of the nature described to charge what they pleased for the doing of the business in which they were engaged. *Their property was being used with their consent by and its use devoted to the public to any extent desired, and the only question was in regard to the compensation which they were entitled to ask for the business thus done. * * * If the owner of one of these wharves had devoted it to the public use and permitted the public to use it as it desired, and demanded compensation for such use, the question as to the amount of such compensation might be raised as in the Munn class of cases,* to be determined with reference to the reasonableness of the charge. But this is no such case."

In the case of *Cargill vs. Minnesota*, 180 U. S., 452, the Act in question (Chap. 148, Gen. Laws of Minn.) in substance declared all elevators erected on railroad rights of way in which grain was received, stored, shipped or handled, to be public elevators; required the owners of such elevators to procure a license from the state Railroad and Warehouse Commission; prohibited the operation of any such elevator unless such license was taken out; and provided that application for such license should be deemed a consent to be bound by all regulations imposed by the Commission, including those relating to the "receipt, storage, handling and shipping of grain therein and therefrom, and the rates of charges therefor." The Act contained further provisions applicable only to public warehouses, such as the requirement that the owner of the elevator "shall, upon the

request of any person delivering grain for storage or shipment, receive the same without discrimination" (pp. 454–9). It appeared that the defendant company had never received, shipped or handled any grain except its own, or offered to do so, and that "the warehouse was used, occupied and operated by the defendant solely for the purpose of receiving, handling and shipping its own grain, in its private capacity as grain owner and merchant"; but it also appeared that the company weighed and graded the grain that it purchased at its warehouse. The Supreme Court of Minnesota (pp. 464–5), after stating the method in which the business was carried on, said (italics ours):

> "'If the business carried on at this warehouse consisted of nothing more than storing defendant's own grain, we would concede thal such business would warrant but little interference or regulation of it by the State. But that business does consist of something more. It was conceded on the argument, and is fairly to be inferred from the findings and stipulation of facts, that the grain is purchased, weighed, graded and delivered at the warehouse, and that defendant, with its own scales and appliances, weighs and grades the grain. Under these circumstances, the warehouse is a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector and grader of the grain. Surely such a business is of a public character and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the State. The business carried on by defendant at its warehouse is similar to that carried on at a large number of other warehouses and elevators in this State. The grain crops of this State constitute by far the most important part of its commerce and its greatest resource. It is important to see that correct weights are had; that uniform grades are given; that the proper amount of dockage and no

> more is taken; that no dishonest practices are allowed and no undue advantage is permitted to be taken. * * * *There are undoubtedly many provisions in the Act which apply only to warehouses and elevators in which grain is stored for others or for the public and which provisions do not and cannot apply to such warehouses as the one here in question. There are perhaps provisions in the Act which it would be unconstitutional to apply to such a warehouse as this.* But such matters need not be considered at this time. The provision recognizing a license is not one of these. This disposes of the only question argued which it is necessary to consider.'"

Thereupon the State Court sustained the provision as to the license, holding that the statute was severable and that the requirement as to the license was not invalidated by other provisions of the Act which were inapplicable to a private grain warehouse. Judge MITCHELL, of the Minnesota Court, while otherwise agreeing with the majority of the Court, was of opinion (p. 465) that the provisions of the Act applicable only to a public warehouse were unconstitutional if applied to a private warehouse like that of the defendant, and that the Act was not severable, and hence was unconstitutional in its entirety.

This Court held itself bound by the decision of the state court as to the severability of the statute; and therefore sustained the decision of that court as to the constitutionality of the license provision. It was said, at page 468:

> "The acceptance of a license in whatever form will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state Railroad and Warehouse Commission that are repugnant to the Constitution of the United States."

The opinion (p. 470), in its last paragraph, states the pre-

cise point and the only point decided by the case, as follows:

> "Without expressing any opinion as to the extent to which the Railroad and Warehouse Commission may supervise the business of a person, firm or corporation receiving a license under the statute and restricting our decision to the only question necessary to be decided, we adjudge that the statute of Minnesota, so far as it requires a license for conducting such business as that in which the defendant is engaged, is not repugnant to the Constitution of the United States."

It is clear from the foregoing extracts and from the whole opinion that nothing more was decided in the case by this Court than that a state might constitutionally require a license for the privilege of carrying on the business of a private grain warehouse at which the grain purchased from others was graded and weighed. As to the Minnesota Court the inference is inevitable that, if necessary to decide the question, it would have held that the other provisions of the Act were unconstitutional as applied to the defendant's warehouse.

The other cases cited under this head in the brief for the Commission establish no different principle than that of the cases above discussed. Each of them involved the regulation of a business in which the owner devoted the property employed in it to a public or quasi-public use or service.

Spring Valley Water Works vs. Schottler, 110 U. S., 347, 354.
(Water supply.)

Dow vs. Beidelman, 125 U. S., 680.
(Railroad rates.)

State vs. Nebraska Telephone Co., 17 Neb., 126; 22 N. W. Rep., 237.

Chesapeake & P. Telephone Co. vs. B. & O. Telegraph Co., 66 Md., 399, 414.

Hackett vs. State, 105 Ind., 250.
(Telephone cases.)

Nash vs. Page, 80 Ky., 539.
(Public warehouse.)

Inter-Ocean Publishing Co. vs. Associated Press, 184 Ill., 438.
(News Bureau.)
N. Y. & Chic. Grain & Stock Exchange vs. Chic. Bd. of Trade, 127 Ill., 153.
(Market reports.)

It is plain from this review of the cases that there is a clear distinction between the situations they involved and that in the case at bar. It is the distinction between a purely private business and a business which consists of service rendered for others. A man who builds an elevator for the elevation, storage and delivery of his own grain is employing his property in his own private business; and there can only be such regulation of that business as is consistent with its private character. A man who maintains an elevator which he employs in the business of elevating, storing and delivering grain for the public is employing it in a quasi-public business, which is subject to regulation as such—that is, regulation to protect the interests of the public in connection with the service so rendered them. But regulation in the latter case can only relate to the business which is being actually carried on and in which the public is so interested. And these cases clearly establish that a man who is maintaining his elevator for his own private use cannot be coerced by law or under the guise of regulation to employ his property for the benefit of others or for the conduct of a quasi-public business.

POINT FIFTH.

Neither the utilization by a pipe line company of the right of way of a common carrier railroad for the laying of a pipe line, nor the crossing under a public highway by such pipe line, impresses upon the pipe line or its owner the nature or the obligations of a common carrier.

I. As to the use of railroad rights of way.

1. Upon this point, the ruling of the Commission in its report sustained the contention of the Appellee. Mr. Commissioner Lane says:

> "While some doubt may exist as to the right by which pipe lines build upon railroad right of way, the mere fact that they are so built does not impress them with common carrier obligations" (Record, p. 52).

And this ruling of the Commission is sustained by the Commerce Court (Record, p. 131).

2. Even if the railroad company acquired or holds its lands subject, *so far as it is concerned*, to a public use, an easement in them which it may confer upon another, not interfering in any way with that public use, is not, by reason of such public use, impressed with *another* public use. There is no escape from the conclusion that whether the grantee of such an easement is a common carrier or not is dependent upon the nature of its business, and not upon the status or business of its grantor (See opinion of KNAPP, P. J., in the Court below, Record, p. 44).

3. The total amount of railroad rights of way utilized by the Appellee for its pipe lines is only 6.7 miles, out of a total of nearly 1,900 miles of trunk and gathering lines. It will hardly be argued that the use of so insignificant an amount of railroad rights of way could impress the serious obligations of a common carrier upon so large a system.

It should be further stated that the pipe lines of the Appellee cross under various railroads at a number of points. The right to cross these is obtained from the railroads by contract providing for a cash consideration, to be paid at the execution of said contracts, and for the payment of an annual rental to the railroad company for maintaining such lines under its track. It cannot be that such crossing under railroads involves any common carrier obligation. If the rail-

roads own the rights of way in fee, then certainly no such obligation follows. If they do not own their rights of way in fee, then the fee is in the abutting owners; but, in this instance, the abutting owner is either the Appellee, which owns the private rights of way on each side of such railroad crossing, or else it is the owner of the adjoining land from whom the Appellee has acquired all the necessary rights.

II. As to highways.

1. The only manner in which any highway has been utilized by any pipe line owned and operated by the Appellee is by laying pipe lines below the surface either along or across such highway. The rights to lay these pipes were acquired from abutting owners, who by law clearly had the power to grant them. There is no foundation either in law or in fact for the assertion that the Appellee, by thus laying its pipes, acquired any "franchises" from the State or from any public body.

Our contention that no common carrier obligations are incurred by laying a pipe line along or across a highway was sustained by the Commission. Mr. Commissioner LANE says (Record, p. 53):

> "It appears that the usual policy of the lines is to deal with the owner of the abutting property in acquiring such highway rights upon the theory that such abutting owners own also the fee in the highway, and that the public right therein is a mere easement of passage. That this is the general rule of law there can be no doubt, and the few exceptions occur in states where the question here at issue is unlikely to arise.
>
> "We are of the opinion that a pipe line is not impressed with the obligations of a common carrier merely because, by arrangement with the abutting owner, it uses a public highway for right of way purposes."

And this conclusion is concurred in by the Commerce Court (Record, p. 131).

2. The rule seems to be almost universal that owners of lands abutting on a public highway have title in fee simple to the centre of the highway, subject only to the public easement of passage, and may use and grant the right to use the soil below the surface for any purpose which does not interfere with such public easement.

Barclay vs. Howell's Lessee, 6 Peters (U. S. Supreme Court), 498, 513.
Callen vs. Electric Light Co., 66 Ohio State, 166.
Daily vs. State, 51 Ohio, 348.
Huffman vs. The State, 21 Indiana Appellate Court, 449.
Town of Old Town vs. Dooley, 81 Ill., 255, 257-8.
Postal Tel. Co. vs. Eaton, 170 Ill., 513.
Winter vs. Peterson, 24 N. J. Law Rep., 524.
Pemberton vs. Dooley, 43 Missouri Appeals, 176, 178.
Paul vs. Carver, 24 Pa. St., 207, 210-11.
Angell on Highways, 2d ed., p. 366.

In *Barclay vs. Howell's Lessee, supra*, at page 513, the Court said:

> "By the common law the fee in the soil remains in the original owner, where a public road is established over it; but the use of the road is in the public, the owner parts with this use only, for if the road shall be vacated by the public, he resumes the exclusive possession of the ground; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road."

In *Callen vs. Electric Light Company*, 66 Ohio State, 166, the defendant placed a number of poles in front of the lot owned by the plaintiff in the City of Columbus without obtaining the consent of the plaintiff or offering him compensation or damages. The defendant contended that the City of Columbus, by proper resolutions and ordinances, had

given it the right to construct the poles. The Court says, at page 172:

> "As to country highways, it seems to be settled in this state that, while the public has the right of improvement and uninterrupted travel, the abutting owner has the right to all uses of the land not inconsistent with this right of travel and improvement."

The Court says again, at page 174, referring to section 2601 of the Revised Statutes (italics ours):

> * * * "*It would seem to follow from the foregoing that, for practical purposes, there is no substantial difference in the right of the owner of land abutting upon a country highway in such highway, and that of the owner of a lot abutting on a city street in such street.* In the one case, where the fee is in the land owner, his rights in and over the streets are in their nature legal, while, if the fee be in the public, the lawful rights of the abutting owners are in their nature equitable easements. In both situations, the right of the public is for road or street purposes, and is necessarily limited to such control as is necessary to accomplish those purposes."

In that case the Court held that the erection of poles, without the consent of the lot owner, worked an appreciable injury and entitled the owner to an injunction.

See also *Schaaf vs. Railway Co.*, 66 Ohio State, 215, at pp. 229–231.
Daily vs. State, 51 Ohio State, 348.

In *Huffman ve. The State of Indiana, supra*, at page 453, the court said:

> "It is the firmly established rule in this State that the owner of lands abutting upon a public highway owns the fee to the center thereof, subject only to the easement which the public has for highway purposes."

The same rule prevails in Illinois.
Town of Old Town ve. Dooley, 81 Ill., 255.

Also in Pennsylvania.

Paul vs. Carver, 24 Pa. St., 207, 210.

In *Pemberton vs. Dooley, supra*, after affirming the usual doctrine that the owner of the soil on the two sides of a country road is the owner likewise of the soil in the road, subject only to the right of a public use as a road, the Court says, at page 179 (italics ours):

> "We conclude, then, that *plaintiff Pemberton had the right to a passway beneath the surface of the highway, provided he in no way disturbed the public use.*"

In *Winter vs. Peterson, supra*, at page 527, the Court said:

> "The possession of the farm was possession of so much of the road as lay within its boundaries. The law has always been so. 'The king has nothing but the passage for himself and his people; the freehold and all the profits belong to the owner of the soil.' I Roll's Abv. 392, Letter B., pl. 1, 2. So do all the trees upon it, and mines under it; *the owner may carry water pipes under it.*"

3. It would seem, therefore, that in the States of Ohio, Indiana, Illinois and Pennsylvania, which are the only states through which this Appellee's pipe lines (whether owned or leased) run, the laying of pipe lines underneath public highways does not impose any obligations, such as those of a common carrier, upon the owners of such pipe line, or upon the pipe line itself. The utmost privilege which the public grants in such a case—if so much—is a license to disturb the surface of the highway momentarily for the purpose of laying the pipes.

In this connection note the language used in *Angell on Highways*, 2nd Edition, page 369, citing authorities, to wit (italics ours):

> "Upon these principles there can be no doubt but that the owner of the land can sink a drain, or any

watercourse, below the surface of his land covered with a way, so as not to deprive the public of their easement. And it is a common practice for the owners of water-mills, or of sites for water-mills, to sink watercourses for the use of their mills in their own land under highways, *care being taken to cover the watercourses sufficiently, so that the highways remain safe and convenient for passengers.* 'If a highway be located over watercourses, either natural or artificial, the public cannot shut up these courses, but may make the road over them by the aid of bridges. But when a way has been located over private land, *if the owner should afterwards open a watercourse across the way, it will be his duty, at his own expense, to make and keep in repair a way over the watercourse,* for the convenience of the public.'"

POINT SIXTH.

The Ohio Act of 1868 has no bearing upon the controversy.

The answers contain various averments to the effect that The Ohio Oil Company has the power of eminent domain, and is, therefore, charged with the duties and obligations of a common carrier. It is understood that these averments are made in the light of an Act passed by the Ohio Legislature in 1868 and since then incorporated in various statutory revisions of that State.

Bates' Annotated Ohio Statutes (6th Ed., 1906), Vol. 2, Section 3878.

This Act can have no possible bearing upon the questions to be decided here. The Ohio Oil Company, by the law of its being, is confined, so far as transporting oil is concerned, to the carrying of its own oil. It was not organized "for the purpose of transporting petroleum," in the sense of the statute

referred to. Such language could only apply to a company organized for the business of transporting petroleum for others. No legislature has power to compel a corporation to accept such a power as that of eminent domain against its will—especially when the acceptance of such a power would carry with it the burdens and obligations of a common carrier. On the contrary, the law of common carriers has always assumed, as a necessary element, that the carrier *voluntarily* undertakes, and holds himself out, to carry for others.

U. S. Express Co. vs. Backman, 28 Ohio St., 144, 150.
Samms vs. Stewart & McKibben, 20 Ohio, 70.
Moore on Carriers, page 20.
United States vs. Sioux City Stock Yards, 162 Fed., 556.

For these reasons the order of the Court below should be affirmed with directions that the injunction be made permanent.

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